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CAUSE NO. 12,764

THE STATE OF TEXAS	§	IN THE DISTRICT COURT OF
	§	
VS.	§	TITUS COUNTY, TEXAS
	§	
BILLY JOE WARDLOW	§	76TH JUDICIAL DISTRICT

STATEMENT OF FACTS

VOIR DIRE EXAMINATION

November 16, 1994

VOLUME 21 of 43 volumes

FILED IN  
COURT OF CRIMINAL APPEALS

OCT 11 1995

Troy C. Bennett, Jr., Clerk

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   §  
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STATEMENT OF FACTS

VOIR DIRE EXAMINATION

November 16, 1994

VOLUME 21 of 43 volumes

Before Honorable Gary R. Stephens

Judge by Judicial Assignment

(Venue changed from Morris County, Texas)

APPEARANCES

ATTORNEYS FOR THE STATE OF TEXAS:

MR. RICHARD TOWNSEND  
District Attorney  
Morris County Texas  
Morris County Courthouse  
Daingerfield, Texas 75638

and

MR. RANDY LEE  
Assistant District Attorney  
Cass County Texas  
P.O. Box 940  
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1 ATTORNEYS FOR THE DEFENDANT:

2 MR. BIRD OLD, III  
3 Old, Rolston & Old  
4 P.O. Box 448  
Mt. Pleasant, Texas 75456-0448

5 and

6 MR. LANCE HINSON  
7 Law Offices of Danny Woodson  
P.O. Box 399  
Mt. Pleasant, Texas 75456-0399

1                   On the 16th day of November, 1994, the  
2                   above-entitled and numbered cause came on for hearing  
3                   before said Honorable Court, Judge Gary R. Stephens of  
4                   Midlothian, Texas, serving by judicial assignment in the  
5                   District Court of Titus County, Texas, on change of venue  
6                   from Morris County, Texas, and the following proceedings  
7                   were had:

8  
9                   (The following occurred outside the  
10                  presence and hearing of any potential juror:)

11  
12                  THE COURT: Let's get on the  
13                  record.

14                  Let the record reflect that no  
15                  prospective jurors are present in the courtroom.

16                  Mr. Townsend, it is my understanding  
17                  that you and Mr. Old have been looking at questionnaires  
18                  and discussing our lineup and that there has been an  
19                  agreement that the State and Defense under 35.05 will  
20                  dismiss and release from this panel all jurors who circle  
21                  any number on Page 1 other than a "2?"

22                  That means people that circled the "1,  
23                  3, 4, 5 and 6's" under the section describing their  
24                  feelings on the death penalty will be excused.

25                  Now, that means specifically today we

1 will excuse juror Billy White, 27, who is a "Number 1",  
2 Bobby Gray, number 36 who is also a "Number 1", James  
3 Brown, number 39, who is a "1" and Linda Smith, juror 40  
4 who is a "Number 4."

5 Do you agree to excuse those specific  
6 jurors along with all jurors who have circled any number  
7 other than "2", Mr. Townsend?

8 MR. TOWNSEND: Yes, Your  
9 Honor.

10 THE COURT: Do you agree, Mr.  
11 Old?

12 MR. OLD: Let me ask a couple  
13 of questions, I don't think we have a problem, I just  
14 want a clarification.

15 THE COURT: All right.

16 MR. OLD: I have been going  
17 through the next 10 that you sent for, we have one that  
18 circled both "1" and "2."

19 MR. TOWNSEND: I hadn't  
20 thought about that, which number is that?

21 MR. OLD: That's number 45.

22 THE COURT: Off the record.

23  
24 (Off the record discussion.)  
25



1 THE COURT: Back on the  
2 record.

3 Let the record reflect there was an off  
4 the record discussion because a couple of our  
5 questionnaires have both "1's" and "2's" or "2's" and  
6 other numbers circled.

7 So, Mr. Old, I understand you agree with  
8 the Court's statement a moment ago that you would dismiss  
9 under 35.05 everyone who circled anything other than a  
10 "2" with the exception of people who circled a "2" and  
11 a "1" or a "2" and a "3", we will bring those in to  
12 clarify what they really are, is that the agreement, sir?

13 MR. OLD: That's the  
14 agreement.

15 THE COURT: And do you  
16 specifically agree to release the jurors scheduled for  
17 today that I stated into the record?

18 MR. OLD: Yes.

19 THE COURT: Mr. Wardlow, do  
20 you agree with this agreement between your lawyer and the  
21 State's lawyer?

22 THE DEFENDANT: Yes, Your  
23 Honor.

24 THE COURT: We will dismiss  
25 all but the "2's."

1                   You may tell Mr. White he has been  
2 released and then tell Mr. Smith we will bring him in in  
3 just a moment.

4                   Off the record.

5  
6                   (Off the record discussion.)

7  
8                   (The following occurred in the presence  
9 and hearing of the potential juror:)

10  
11                   THE BAILIFF: Watch your step  
12 and sit right up there, sir.

13                   THE POTENTIAL JUROR: Here?  
14 (Indicating)

15                   THE BAILIFF: Yes. Take your  
16 coffee up there if you want, you may need a sip of it.

17  
18                   CARL EUGENE SMITH, Potential Juror #307,  
19 was called as a Potential Juror and, having been  
20 previously sworn by the Court, testified as follows:

21  
22                   THE COURT: Good morning, sir.  
23 Go ahead and take a seat.

24                   Are you "Carl Smith?"

25                   THE POTENTIAL JUROR: Yes.

1 THE COURT: This is juror 38.

2 Mr. Smith, first I appreciate you coming  
3 down on shorter notice, we had a couple of jurors  
4 scheduled before you but for reasons I don't need to go  
5 into we are not going to talk to those two individuals.

6 That left us without anyone to talk to  
7 so again thanks for rearranging your schedule.

8 Mr. Smith, I'm Gary Stephens, I am  
9 presiding over the jury selection and trial in this case.

10 There are two District Attorneys that  
11 are representing the State. Present in the courtroom is  
12 Mr. Richard Townsend, he is the District Attorney from  
13 Morris County.

14 THE POTENTIAL JUROR: Yes.

15 THE COURT: His partner for  
16 this case is Randy Lee, he's in a murder trial in another  
17 county, cannot be here.

18 We have two Defense Attorneys present,  
19 we have Mr. Bird Old, III.

20 MR. OLD: Good morning.

21 THE COURT: Mr. Lance Hinson.

22 MR. HINSON: Good morning.

23 THE COURT: Next to Mr. Hinson  
24 the person charged, Mr. Billy Joe Wardlow.

25 Now, Mr. Smith, the lawyers have read

1 your questionnaire and they are familiar with your  
2 answers, they are going to talk to you about some of  
3 those answers and they are also going to talk to you  
4 about the principles of law and issues involved in a  
5 death penalty case.

6 You will be asked a lot of questions and  
7 the answers will let us know whether or not to put you  
8 on the jury.

9 In order to be a juror you must be able  
10 to understand and follow the law, you don't even have to  
11 agree with the law.

12 If you disagree with some aspect of our  
13 law but you can still follow the law you are qualified  
14 but if you can't follow the law you are not qualified.

15 So we will explain some of the laws to  
16 you and ask you what you think about them, whether you  
17 can follow them.

18 And, sir, we need more than "Yes, I can  
19 follow the law" or "No, I can't."

20 In a death case we have found even  
21 though most people can follow the law that doesn't  
22 necessarily mean that this is the type of case they  
23 should be on so we want to know what you think about our  
24 laws and think about some of the issues we will discuss.

25 The lawyers may also use examples to try

1 to illustrate a point. If they do I want you to  
2 understand they are not using examples or fact situations  
3 from this case. The alleged facts of this case will be  
4 brought out in trial and it's inappropriate for us to get  
5 a juror to try to pre-judge a case. So when we are  
6 talking about some fact situation it has no relevance to  
7 this case at all.

8 Now, we frankly don't care what your  
9 answers are but we very much care to understand how you  
10 feel.

11 So what we want you to do is just open  
12 up and be honest with us and we will try to decide  
13 whether or not to put you on the jury.

14 There are no right or wrong answers,  
15 there are no right or wrong opinions.

16 THE POTENTIAL JUROR: Right.

17 THE COURT: Just yours, sir.

18 The trial will not begin until after the  
19 first of the year, it will probably last two weeks so I  
20 need to know, sir, if you know of any reason that you  
21 could not serve for a two-week period on this jury in  
22 January of '95 if chosen?

23 THE POTENTIAL JUROR: No. No.

24 THE COURT: Do you have any  
25 questions of us?

1 THE POTENTIAL JUROR: Not  
2 right now.

3 THE COURT: Mr. Townsend.

4 MR. TOWNSEND: Thank you, Your  
5 Honor.

6

7

VOIR DIRE EXAMINATION

8

BY MR. TOWNSEND

9

10 Q Mr. Smith, I noticed from looking at your  
11 questionnaire that you had had open heart surgery.

12

How long ago was that?

13

A December the 8th.

14

Q It has been about a year?

15

A Yes. Almost a year.

16

Q Is your health good at this time?

17

A Right.

18

Q That would hinder you so far as serving on the  
19 jury?

20

A No, sir.

21

Q Okay. You said you worked part-time, you  
22 cannot sit for a long time.

23

Generally in here we will take a break  
24 about every hour or hour and a half, would that be any  
25 kind of problem for you?

1           A           No, sir.

2           Q           All right. We got that out of the way and let  
3 me ask you or first tell you that like the Judge said,  
4 there's no right or wrong answers, we are simply seeking  
5 to sort of find out what your opinions are.

6                       I'm going to ask you some questions  
7 about law, some questions about the death penalty in  
8 particular.

9                       When I get through the other side will  
10 ask you some questions sort of from their point of view.

11                      I have read your questionnaire and  
12 understand what you have said about the death penalty  
13 and I want you to know that the State through the  
14 District Attorney's Office is seeking the death penalty  
15 in this case and talk to you a little bit about the way  
16 the death penalty works in Texas.

17                      I think maybe back in the old days the  
18 jury went back and if they found the defendant guilty of  
19 capital murder maybe they just voted whether to give him  
20 a life sentence or the death penalty.

21                      It's done differently in Texas now.  
22 Once you decide if a person is guilty or not guilty then  
23 there's a punishment hearing that is held, once you have  
24 heard all that evidence then you go back and answer a  
25 couple of questions and that, the answer to those

1 questions determine whether the defendant receives the  
2 death penalty or not.

3 So it's a little bit different.

4 Let me talk to you first about the kind  
5 of juror we need, those kind of jurors who can keep an  
6 open mind as to whether the appropriate punishment in a  
7 case should be a life sentence or the death penalty.

8 From your questionnaire it appears that  
9 you believe in the death penalty in some murder cases and  
10 that a life sentence would be appropriate in some murder  
11 cases, is that kind of the way you still feel?

12 A Dependant on the circumstances and evidence put  
13 out.

14 Q Okay. Let me talk to you about murder in Texas  
15 a little bit; murder in Texas takes on two forms,  
16 basically there is what I call "plain murder" which is  
17 a non-capital murder, the most a person can be punished  
18 for that murder is either a life sentence or 99 years,  
19 they cannot receive the death penalty.

20 And that type murder is the murder where  
21 someone has intentionally or knowingly caused another  
22 person's death and that is to say without legal  
23 justification or excuse. We are not talking about a case  
24 of self defense or accident but someone has intentionally  
25 caused another person's death and didn't have a good



1       excuse for it but that's not punishable by the death  
2       penalty.

3               The only type murder in Texas that is  
4       punishable by the death penalty is capital murder.

5               Capital murder is that intentional  
6       causing of death like in the plain murder plus something  
7       else. And that plus something else can be one of several  
8       things, for instance, murder of a police officer or  
9       fireman following their line of duty, murder that takes  
10      place during the commission of a robbery or burglary or  
11      rape or kidnapping.

12              The kind of jurors we have got to have  
13      are those jurors that can keep an open mind throughout  
14      the trial as to what the proper punishment should be and  
15      that is to say that their mind is not made up, they  
16      haven't discussed that the person should receive a life  
17      sentence for a capital murder or they haven't decided  
18      that the person should receive the death sentence for a  
19      capital murder, they are just going to keep an open mind  
20      on that until they have heard all the evidence.

21              Could you do that?

22      A           Yes, sir.

23      Q           Okay. I'm going to show you what has been  
24      marked, I think it says "Exhibit 3" up there, the copy  
25      of the indictment in this case.

1 THE COURT: It's under that  
2 page right there. (Indicating)

3 THE BAILIFF: Right there.  
4 (Indicating)

5 THE COURT: No. I think --

6 THE BAILIFF: You just had it.

7 THE POTENTIAL JUROR: Second  
8 one?

9 THE COURT: That's it.  
10 (Indicating)

11 THE POTENTIAL JUROR: Okay.

12 MR. TOWNSEND: If you would  
13 just read that to yourself and I will talk to you about  
14 it.

15 THE POTENTIAL JUROR: Okay.

16 Q (BY MR. TOWNSEND) Okay. Mr. Smith, that's a  
17 copy of the indictment in this case and you see where  
18 it's -- if the State could prove everything in that  
19 indictment that that would not be just plain murder, that  
20 would be what we call capital murder because we have  
21 alleged both a murder and a robbery?

22 A Yes.

23 Q Okay?

24 A Yes.

25 Q If you will there is a sheet of paper up there

1           that is -- I call it a "flow chart", looks like that.

2                           Do you have that in front of you?

3           (Indicating)

4           A           Right.

5           Q           Okay. That just kind of describes how a  
6           capital murder trial goes and I will go over that with  
7           you real quick; first of all you start out at the top of  
8           the page, you are going to hear the guilt or innocence  
9           phase of the trial, you are going to hear a lot of  
10          evidence and that evidence pertains as to whether the  
11          defendant committed the crime or not.

12                          At the end of hearing all that evidence  
13          then the jury will go back and deliberate.

14                          If the jury decides that the defendant  
15          is not guilty then the trial is over and everybody goes  
16          home, if on the other hand, the jury decides the  
17          defendant is guilty then you go down to this next phase  
18          of the trial in the middle of the page there which is the  
19          "punishment phase" then you are going to hear more  
20          evidence.

21                          Now, that evidence will not pertain to  
22          whether the defendant is guilty or not guilty because you  
23          have already made that decision, that evidence is going  
24          to pertain strictly to try to help you determine whether  
25          the proper punishment should be a life sentence or the

1 death penalty.

2 You might hear evidence of family, the  
3 defendant's family history, the defendant's education,  
4 the defendant's mental ability, you might hear from a  
5 psychologist, you might hear from a psychiatrist, you  
6 might hear from the defendant's minister, you might hear  
7 evidence of the defendant's prior bad acts of misconduct  
8 or prior crime. Just any sort of thing, almost anything  
9 you can imagine you might hear at a punishment hearing.

10 Then after you have heard all that  
11 evidence you decide the answer to Special Issue #1 and  
12 that Special Issue is a question and we will go over what  
13 those questions are in just a minute but for right now  
14 you are going to have a question there that you answer  
15 "Yes" or "No" and you do that based on the evidence that  
16 you have heard.

17 If you decide the answer to that should  
18 be "No" then the defendant receives a life sentence, if  
19 you decide the answer to that is "Yes" then you go to  
20 Special Issue #2.

21 A Yes.

22 Q Special Issue #2 is another question that you  
23 answer "Yes" or "No."

24 If you answer that question "Yes" then  
25 the defendant receives a life sentence, if you answer

1       that question "No" then the defendant receives the death  
2       penalty.

3               So what we are looking at here is if you  
4       answer that first question "Yes" the second question "No"  
5       the defendant receives the death penalty, answer them any  
6       other way he will receive a life sentence.

7               So what you are really doing is  
8       answering these questions, you are not deciding whether  
9       he gets the death penalty or not, you are just answering  
10      those questions but of course you are going to know what  
11      the results are because I just told you.

12              If it's "Yes" and "No" he gets the death  
13      penalty, if it's anything else he doesn't.

14              And, now, you are probably wondering  
15      what those questions are, there's a sheet up there that  
16      says "Special Issues" on the top, if you will look at  
17      that sheet -- have you got the sheet there?

18      A           Yes.

19      Q           If you will just read Special Issue #1 and then  
20      we'll talk about it.

21              Okay. On that you have to weigh all the  
22      evidence and all that before you can really make any  
23      decision at all, right?

24      A           Right.

25      Q           That's correct. And that's what you should do.

1                   Let me talk to you just about Special  
2 Issue #1 and we will go over Special Issue #2 in a little  
3 bit.

4           A           Okay.

5           Q           And Special Issue #1 basically talks about the  
6 future dangerousness of the defendant, is that kind of  
7 the way it looks to you?

8           A           Yes, sir.

9           Q           Let me point out a few things there, one is in  
10 a criminal case we are required to prove the defendant  
11 is guilty beyond a reasonable doubt.

12                   If you will notice there on that first  
13 line of Special Issue #1 we are also required to prove  
14 Special Issue #1 to you beyond a reasonable doubt?

15          A           Right.

16          Q           And then down on that second line is that --  
17 the word that's marked in a little darker lettering  
18 there, "probability."

19                   "Probability" in Texas law is defined  
20 as "more likely than not."

21                   I call it just a little bit more than  
22 50/50. It's more likely than not.

23                   Basically your definition of  
24 "probability" if you were giving the definition is that  
25 about the way you see that word?

1 A Yes, sir.

2 Q Okay. Then on further on the second line it  
3 describes criminal acts of violence, it says, you know,  
4 we are required to prove to you beyond a reasonable  
5 doubt, it's basically more likely than not that the  
6 defendant would commit criminal acts of violence.

7 Now, there's a lot of criminal acts,  
8 some of those are violent and some of them aren't.

9 We are required to prove to you that not  
10 necessarily that he would commit another capital murder  
11 but that he would commit some criminal act of violence.

12 Of course forgery and theft, those  
13 aren't acts of violence but on the other hand, assault,  
14 attempted murder, things like that are criminal acts of  
15 violence that would constitute a continuing threat to  
16 society.

17 When you and I think of "society" we  
18 probably think of in our homes and on the street and that  
19 sort of thing but actually "society" under the law,  
20 "society" is the people, no matter where they are or what  
21 they are doing, even if they are in the penitentiary  
22 those people that are in the penitentiary, those inmates  
23 are part of society, those guards are part of society as  
24 well, the nurses and doctors, anyone out on the street  
25 is part of society so we are not required to prove to you

1       that he would commit a criminal act of violence in any  
2       particular spot, whether it be the penitentiary or  
3       anywhere else but just somewhere else in society.

4                   Are you with me on all that?

5       A           Right.

6       Q           The important thing on Special Issue #1 is that  
7       -- and Issue #2, but we will go to Number One first, is  
8       I have had jurors who have come in here and said, "Okay.  
9       Now, if I find a person guilty of capital murder then I  
10      really don't need to hear that punishment evidence. I  
11      am already going -- I already feel I know that my answer  
12      to Special Issue #1 is going to be 'Yes'."

13                  You see, they are not a qualified juror  
14      because they are not waiting until they have heard that  
15      evidence during the punishment hearing to help them make  
16      their decision, they are shutting their mind, you might  
17      say?

18      A           Right.

19      Q           And what we need are those jurors who can keep  
20      an open mind throughout that punishment hearing before  
21      deciding what their answer should be on Special Issue #1.

22                  Do you believe you could do that?

23      A           Yes.

24      Q           Okay. Now, keep in mind that evidence you have  
25      heard during the guilt and innocence phase of the trial,



1 we are not expecting you to forget that, you can  
2 certainly use that in helping you determine Special Issue  
3 #1, but, you know, you can't just use that, you have got  
4 to also listen and consider that evidence that you hear  
5 during the punishment hearing.

6 Do you believe you could do that?

7 A Yes, sir.

8 Q Okay. Now, if you will read Special Issue #2  
9 and we will talk about that for a little bit.

10 Okay. Mr. Smith, this is a legal  
11 mouthful there, isn't it?

12 A It is. It's hard to understand for a layman.

13 Q Okay. Basically after you found the defendant  
14 guilty in -- of capital murder, and keep in mind as the  
15 Judge said, we are not really talking about this case,  
16 we are just talking about capital murder cases in  
17 general.

18 Let's say you are a juror on a capital  
19 murder case, you found a defendant guilty of capital  
20 murder, you answer "Yes" to Special Issue #1 because if  
21 you answer "No" you never would get to Number Two.

22 A Yes.

23 Q Say you have answered "Yes" to Number One, when  
24 you get to Number Two that, unlike Special Issue Number  
25 One where we have got to prove it to you beyond a

1 reasonable doubt we don't have to prove it to you on  
2 Number Two, it's just your opinion.

3 A Yes.

4 Q You know, what do you think, is this a death  
5 penalty case or is this a death penalty type defendant,  
6 you know, we are not --

7 A Well, I really can't hardly make a decision  
8 until you hear all the evidence and see which way you  
9 want to go with it.

10 Q Right.

11 In Special Issue #2 I think the  
12 significant line in there is that where it starts out and  
13 says, "sufficient mitigating circumstance" or  
14 "circumstances."

15 And that term basically means -- and  
16 "mitigating evidence" is defined there at the very  
17 bottom? (Indicating)

18 A Yes.

19 Q And that's evidence that reduces the  
20 defendant's moral blameworthiness or reduces his blame,  
21 it doesn't excuse his behavior but maybe reduces in a  
22 person's mind the amount of blame that a person should  
23 receive for that behavior.

24 "Sufficient mitigating circumstance",  
25 that means just the fact that something is mitigating

1. doesn't mean it reduces, that you give him a life  
2 sentence rather than the death penalty, it has to be  
3 sufficient in your mind, enough mitigating circumstance  
4 or circumstances, the type of evidence that you might  
5 hear in a punishment hearing.

6 And you know, you might hear this  
7 evidence from either this side of the room or from that  
8 side of the room but basically what we are talking about  
9 is evidence that might make you feel that the defendant  
10 was a little less blameworthy than you might normally  
11 think.

12 And many things in many people's mind  
13 could cause them to believe that, it depends on how you  
14 feel about certain kinds of evidence.

15 For instance, you might -- if there was  
16 evidence that a capital murder defendant was mentally  
17 retarded some people might feel like that reduces his  
18 blame to some extent, if there was evidence presented  
19 that a capital murder defendant was intoxicated one juror  
20 might listen to that and say, "Well, he's not quite as  
21 much to blame because he was intoxicated", another juror  
22 might say, "Well, it doesn't make me any difference, he's  
23 still responsible."

24 So, you know, it might, you know, some  
25 people might feel like if the defendant had a rough

1       upbringing or something that might excuse him -- not  
2       "excuse it" but reduce the blame to a certain extent.

3               So, anyway what one person might feel  
4       is sufficiently mitigating another person might not feel  
5       that way at all. So it's just kind of up to your  
6       opinion.

7               The important thing about Special Issue  
8       #2 is that before you make your decision on Special Issue  
9       #2 even though you found him guilty of capital murder,  
10      even though you decided he's a continuing threat to  
11      society but you base your answer to Special Issue #2 on  
12      all that evidence that you have heard up until then.

13              Could you do that?

14       A       Yes, sir.

15       Q       Okay.

16       A       Because I don't believe a person is not  
17      responsible for their mind, they are drunk, that's their  
18      responsibility.

19       Q       We are not trying to pin you down.

20       A       I know that. I understand. But I'm just  
21      telling you how I feel about it, a person's upbringing  
22      and all this because I have been down that road.

23       Q       Okay. One thing that we -- that is important  
24      in deciding Special Issue #1 or Issue #2, and I think  
25      sometimes more so with Issue #2 is that you are going to

1 hear all the evidence during the punishment hearing.

2 In order to be a qualified juror we have  
3 got to have those jurors who will keep an open mind and  
4 listen and consider all that evidence.

5 A Yes.

6 Q Now, that doesn't mean you have to give weight  
7 to it.

8 A Right.

9 Q It doesn't mean you have to say, "Hey, that's  
10 important because I heard it", you know, you can hear it  
11 and decide, "Well, that just doesn't seem important to  
12 me" or "I'm not sure that that has anything to do with  
13 this case", you know.

14 For instance, some people don't believe  
15 very much or any in psychologists or psychiatrists and  
16 that's fine, whatever a person believes is fine but in  
17 order to be a qualified juror we have to have those kind  
18 of jurors who will keep an open mind and whether that  
19 witness is a psychologist or a minister or the  
20 defendant's mother or whoever it might be that that juror  
21 will keep an open mind and listen and consider all their  
22 testimony and then decide whether they think it's  
23 important or not and not just say, "Well, that person,  
24 that's the defendant's mother, obviously she is going to  
25 be doing this or doing that" or "That's a psychologist,

1 I don't believe anything they have got to say."

2 We have got to have people that will be  
3 -- will listen to that evidence, consider it all and then  
4 make up their mind as to what the correct answer should  
5 be to that question.

6 Could you do that?

7 A Yes.

8 Q Okay. One thing that is important on these  
9 Special Issues is that you answer those questions as the  
10 evidence dictates it to you that you should answer those  
11 questions and not being a case "Well, I think this guy  
12 needs a life sentence so I'm going to answer this way"  
13 or "I think this guy needs the death penalty so I'm going  
14 to answer this way."

15 Could you do that?

16 A Yes, sir.

17 Q And just let the chips fall where they may?

18 A Yes, sir.

19 Q Just give your honest answer, what you think  
20 is appropriate and if it turns out it's a life sentence,  
21 okay, if it turns out it's the death penalty, okay?

22 A Right.

23 Q Could you do that?

24 A Right.

25 I am retired Military and I have been

1 on quite a few court marshals so I understand what you  
2 are talking about.

3 Q When you say you "have been on court marshals",  
4 you mean as a juror or a witness?

5 A Both.

6 Q "Both?"

7 Okay. Well, in the Military I know that  
8 you are required to follow the rules and that's kind of  
9 the way this is in Court, there are certain rules just  
10 like in life where we are required to pay our taxes, we  
11 may not like it but we do it anyway?

12 A Yes.

13 Q Well, that's the way it is in Court, you have  
14 rules that you have to follow and in order to be a  
15 qualified juror you don't have to agree with those rules  
16 as long as you can follow the law and follow those rules.

17 Do you believe you could do that?

18 A Yes. I did for 20 years.

19 Q Okay. There are several things about a capital  
20 murder trial that are -- that are different, several  
21 things that are, you know, very similar to other trials.

22 In a capital murder trial when you are  
23 considering the answer to Special Issue #1 and Issue #2  
24 if a person is found guilty of capital murder they are  
25 going to be required to serve 35 years in the

1 penitentiary, 35 calendar years if they receive a life  
2 sentence before being eligible for parole.

3 That doesn't mean that they would get  
4 a parole at the end of 35 years, they might get it at the  
5 end of 35 years or they might never get it but they would  
6 become eligible for parole at the end of 35 years.

7 I believe the Court in its instruction  
8 to you before you deliberate punishment I believe the  
9 Court would instruct you that in order to follow the law  
10 what you have to do is assume that a life sentence is a  
11 life sentence and assume the death penalty is the death  
12 penalty and not consider parole in any way.

13 Now, human nature being what it is we  
14 are not asking you to put that out of your mind because  
15 obviously if a person gets something in their mind they  
16 can't get it out but basically to set it aside when you  
17 are deciding on Special Issue #1 and Special Issue #2 and  
18 decide those answers like I just said based on the  
19 evidence and let the chips fall where they may and not  
20 say, "Well, I'm going to answer this a certain way  
21 because I am concerned about parole."

22 Could you do that?

23 A Yes.

24 Q And not use parole in any way in your  
25 consideration to either one of those questions?



1           A           No, sir.

2           Q           I want to shift gears with you a little bit and  
3 talk to you about some areas of the law that pertain not  
4 only to capital murder cases but maybe to other type  
5 cases as well.

6                       The range of punishment in a murder,  
7 which is what we talked about earlier, not a capital  
8 murder but a non-capital murder is from five years  
9 probation to 99 years or life.

10                      Now, of course murder in Texas can be  
11 a lot of different things, it can be a very vicious type  
12 crime, on the other hand, it can be basically a mercy  
13 killing where an older couple lived together for years  
14 and one of them has cancer and is in a lot of pain and  
15 begs the other one to pull the plug.

16                      If the other one pulls that plug in  
17 Texas that's murder because they have intentionally  
18 caused another person's death but most of us may not look  
19 at that the same way as we look at some vicious type  
20 crime, type murder.

21                      So the range of punishment is broad so  
22 that at jury can listen and consider all the evidence  
23 before they decide, you know, what would be the  
24 appropriate range of punishment, whether it's five years  
25 probated or 20 years in the penitentiary or 99 years or

1 life in the penitentiary.

2 If you are a juror on a murder case in  
3 order to follow the law you would have to be able to  
4 consider that full range of punishment.

5 That's not to say you have to give 99  
6 years or you have to give five years probation but you  
7 have to be able to consider all of it.

8 Could you do that?

9 A Yes.

10 It comes back to evidence again.

11 Q Okay. Let's say you are a juror in a capital  
12 murder case and let's say where the indictment -- of  
13 course we are required to prove what -- the State is  
14 required to prove what is in that indictment and let's  
15 say the capital murder case is a murder and robbery and  
16 in order for us to -- for you to find the defendant  
17 guilty of capital murder in that situation we have got  
18 to prove to you beyond a reasonable doubt not only the  
19 murder but also the robbery.

20 If we prove the murder to you but we  
21 didn't prove the robbery to you you would have to find  
22 the defendant not guilty of capital murder but guilty of  
23 that lesser offense of murder.

24 Could you do that if we didn't quite  
25 prove our robbery to you?

1 A Yes.

2 Q Okay. And the reason -- one of the reasons for  
3 an indictment is to give the defendant notice as to what  
4 he's charged with and for that reason we are required to  
5 prove capital murder by what is on the indictment.

6 And when I say that what I mean is we  
7 have to prove murder and robbery.

8 Murder and rape is also capital murder  
9 but if murder and rape is not in that indictment and, for  
10 instance, for some wild reason the evidence showed you  
11 that we proved a murder but not a robbery but we did  
12 prove a rape, still we haven't proved what we put in that  
13 indictment so you would have to find the defendant not  
14 guilty of capital murder but guilty again of murder.

15 Could you do that?

16 A Yeah.

17 Q Okay. And all that sort of relates back to the  
18 burden of proof.

19 Let me mention one other thing about a  
20 murder case, a murder can be proved by saying, you know,  
21 we can prove that one of two ways, that someone  
22 intentionally caused another person's death or that they  
23 knowingly caused another person's death.

24 The legal definition of those are a  
25 little different.

1 "Intentionally", that it was your  
2 conscious objective or desire to do this, "knowingly" is  
3 a little bit less than that in that it's, you do it and  
4 you knew it could be, it was likely to occur but you  
5 didn't set out to do it that way, you knew if you did  
6 what you did it was likely to happen but you didn't set  
7 out to do it.

8 If we proved in a capital murder --  
9 murder case you can prove intentionally or knowingly  
10 either one and that's sufficient but in a capital murder  
11 case we have got to prove it was intentional.

12 Let's say we proved the robbery to you,  
13 we proved the murder to you but we didn't prove that it  
14 was done intentionally, we only proved that it was done  
15 knowingly so the defendant could not be found guilty of  
16 capital murder but they could still be found guilty of  
17 murder.

18 If that happened would you find the  
19 defendant not guilty of capital murder and just guilty  
20 of murder?

21 A Yes.

22 Q The burden of proof in a criminal case is  
23 beyond a reasonable doubt and that's a burden that the  
24 State has.

25 The Defense, on the other hand, has no

1       burden of proof, they are not required to prove that he's  
2       not guilty, we are required to prove that he is guilty  
3       and that's something we accept and we knew going in it  
4       was that way and that's just the way the law is and  
5       that's fair.

6                       Is that okay with you?

7       A            Yes.

8       Q            All right. Along with that burden of proof is  
9       the Fifth Amendment privilege and that's the defendant's  
10      right not to testify.

11                    If the defendant chose not to testify  
12      during the guilt or innocence phase of the trial in order  
13      to be a qualified juror you cannot hold that against him  
14      in any way in deciding whether he was guilty or not  
15      guilty.

16                    Could you do that?

17      A            Yeah. But it would still put a doubt in your  
18      mind why he didn't testify to defend himself.

19      Q            Mr. Smith, I think it's human nature that you  
20      would be curious.

21      A            Right.

22      Q            And you would wonder and maybe think to  
23      yourself, "Well, if it was me I would want to get up  
24      there and tell my side of the story" but there may be any  
25      number of reasons why the defendant would not testify and

1           that's not really for us to speculate about.

2           A           Right.

3           Q           But it kind of goes back to following the  
4 rules, the law says and again I used the phrase several  
5 times, we know you can't put it out of your mind, we are  
6 not asking you to put it out of your mind but we are  
7 asking you to lay that aside and decide this case based  
8 on the evidence presented and not say, for instance,  
9 "Well, they didn't quite prove it but since he didn't  
10 testify that's probably good enough."

11                       You know, we have got to have jurors  
12 that cannot hold it against him in any way.

13                       Like I said, not necessarily put it out  
14 of your mind but not use that in your decision-making  
15 process at all and base your decision strictly on the  
16 evidence that is presented, could you do that?

17           A           Yes. But you would still have that doubt like  
18 you was talking about why he didn't.

19           Q           Well, again, that is human nature and that's  
20 okay as long as you don't use it in any way in deciding  
21 whether he's guilty or not guilty.

22                       Could you do that?

23           A           Yes.

24           Q           Okay.

25                               THE COURT: Thirty minutes.

1 MR. TOWNSEND: Thank you, Your  
2 Honor.

3 And the same holds for that punishment  
4 phase of the hearing, again, going back to human nature,  
5 I think it's human nature for a lot of people to think,  
6 "Well, we found this guy guilty of capital murder, in  
7 order for me to give him a life sentence it would sure  
8 make me feel better about it, I want him to get up there  
9 and say he's sorry."

10 But again, that Fifth Amendment  
11 privilege, he doesn't have to get up there and testify,  
12 he doesn't have to say he's sorry, he doesn't have to  
13 testify in any way unless he chooses to.

14 And again, in order to follow the law  
15 we have got to have the type juror who in answering  
16 Special Issue #1 and Special Issue #2 will answer those  
17 questions strictly based on the evidence, not hold it  
18 against the defendant in even a small way if he chooses  
19 not to testify because, after all, you don't know why he  
20 did it?

21 THE POTENTIAL JUROR: You are  
22 right.

23 Q (BY MR. TOWNSEND) Could you do that?

24 A Yes.

25 Q Mr. Smith, there could be any number of reasons

1        why a defendant might not testify, he might stutter, he  
2        might be so nervous that he just couldn't do a good job  
3        of testifying, he might be -- he might want to testify  
4        but yet his attorney advised him against it, you know,  
5        there's a lot of reasons there that really are no concern  
6        of those people on the jury so far as making their  
7        decision.

8                        Like I said, human nature, you might  
9        wonder about it and that's okay so long as you don't use  
10       that as part of your decision-making process, okay?

11       A                Okay.

12       Q                You could do that?

13       A                Yes.

14       Q                Talking about the indictment awhile ago, the  
15       indictment, I think the Judge told you back in October  
16       when you were here an indictment is not evidence of  
17       anything, that's merely a charging instrument that the  
18       Grand Jury uses to notify the defendant what he's charged  
19       with but you cannot consider it evidence of any kind.

20                        Could you do that?

21       A                Yes.

22       Q                Okay. In many criminal cases, capital murder  
23       cases or other type criminal cases you will hear  
24       confessions or have read to you a confession or maybe  
25       given a copy of a confession to look at.



1 I would expect that the Court would  
2 advise you that in order to use that confession as  
3 evidence in helping determine whether the defendant is  
4 guilty or not guilty you would first have to decide that  
5 the confession was truthful and voluntary.

6 And when I say "voluntary" I mean  
7 legally voluntary and of course voluntary legally means  
8 what you and I think of as "voluntary", that is to say  
9 he wasn't beat up or forced to do it but it means other  
10 things, too; there are times when it's appropriate under  
11 the law that a defendant be read his Miranda Rights prior  
12 to giving a statement of some sort.

13 Are you familiar with that term,  
14 "Miranda Rights", that's the right to remain silent?

15 A Yes.

16 Q Right to have an attorney present and -- and  
17 that sort of thing?

18 There are situations where a confession  
19 is not legally voluntary unless the defendant was --  
20 excuse me -- read his Miranda Rights.

21 In order for you to follow the law, in  
22 order to be a qualified juror you would have to be able  
23 to take a confession -- let's assume that you believe the  
24 confession is truthful but you don't believe that he was  
25 read his Miranda Rights and it was a time when it was

1 appropriate and he should have been read his Miranda  
2 Rights, in order to follow the law you have to take that  
3 confession just like you were talking about some of this  
4 other stuff, can't expect you to put it out of your mind,  
5 but you would have to set it aside and not use it as  
6 evidence in any way because it was not done legally.

7 Could you do that?

8 A If it wasn't legally you couldn't.

9 Q You could not use it then, is that what you are  
10 saying?

11 A Right..

12 Q I thought that's what you were saying but I  
13 wanted to be clear on it.

14 When I say you "couldn't use it", you  
15 couldn't use it to determine guilt or innocence, would  
16 you be able to do that?

17 A Yes.

18 Q You wouldn't even be able in determining the  
19 credibility of witnesses -- and when I say that what I  
20 mean, maybe you have got two witnesses and they are  
21 telling sort of different stories but one of them's story  
22 kind of goes along with what the confession says, you  
23 wouldn't be able to use that confession to help you  
24 determine which one of those people's story you went  
25 along with, you would have to make that determination

1 based on just listening to those people and deciding if  
2 they sound like they are telling the truth and other  
3 evidence that had been presented.

4 Could you do that?

5 A Yes.

6 It would be what other people said and  
7 what they said and weigh it out.

8 Q And that also goes for the punishment phase,  
9 when you decide the answer to Special Issue #1 and Issue  
10 #2 if, let's say for instance you heard a confession and  
11 that you decided it was not voluntary but during that  
12 confession that you believed to be truthful the defendant  
13 describes committing an extremely brutal murder, you  
14 would not be able to use that confession to say, "Okay.  
15 Now, on Special Issue #1 I think he's going to be a  
16 threat to society because I remember back in that  
17 confession where he said some bad stuff."

18 You wouldn't be able to use that  
19 confession in any way even for Special Issue #1 and Issue  
20 #2, you would have to decide that on the legal evidence  
21 that was presented.

22 Could you do that?

23 A Yes. To be legal.

24 Q Mr. Smith, you mentioned in your questionnaire,  
25 you may not remember answering this question but you said

1       you had served on jury duty; have you ever served on a  
2       Grand Jury?

3       A           No.

4       Q           And you mentioned that you had served in civil  
5       cases, have you not served in criminal cases?

6       A           No.

7       Q           You mentioned you had been on court marshals  
8       and you said both as a juror and as a witness, I believe?

9       A           "Juror and a panel", sit on the panel, what  
10      they call "the panel."

11      Q           Okay.

12      A           With the attorneys.

13      Q           How long ago was that?

14      A           Early 60s, middle 60s.

15      Q           It has been a good long while?

16      A           Yes.

17      Q           You have answered this in your questionnaire,  
18      let me ask you again; do you know anything at all about  
19      the facts of this case?

20      A           No.

21      Q           Haven't read anything about it?

22      A           I read a little bit in the paper that it  
23      happened and all this. That was it.

24      Q           You haven't talked to anybody about it?

25      A           No, sir.

1 Q Haven't seen anything on TV about it?

2 A No.

3 Q What was it that you read in the newspaper and  
4 what do you remember reading in the newspaper?

5 A That a murder was committed and that the  
6 individual was in a closet, I believe the body was found  
7 in a closet and a robbery was performed -- I mean a  
8 robbery occurred, too.

9 Q Okay.

10 A And that had got out, you know, got away.

11 Q Okay. Did you ever hear -- do you remember the  
12 victim's name?

13 A No.

14 Q The victim's name was "Carl Cole", did you know  
15 him?

16 A No.

17 Q The defendant in this case is Billy Wardlow,  
18 do you remember his name being connected with whatever  
19 it was that you read in any way?

20 A No.

21 Q Let's talk about what you have heard.

22 Of course I think you understand that  
23 whatever you read in the newspapers is not evidence?

24 A Right.

25 Q Can't be used in any way in helping you to make

1 your determination of guilt or innocence.

2 Let me just talk to you a little bit  
3 about -- do you remember -- you said something about "the  
4 closet, the victim being in the closet?"

5 A Yes.

6 Q Let's just assume that you heard evidence  
7 during the trial that the victim was in the closet and  
8 maybe you heard evidence that the victim was somewhere  
9 else other than the closet, you are going to have to  
10 decide this case based on the evidence that is presented  
11 here today, not say, "Well, I think I'm going to go along  
12 with that person because she told it the way they said  
13 it in the newspaper, she went along with the closet  
14 story."

15 A Yes.

16 Q That would be improper because you are using  
17 that newspaper article to help you decide what the  
18 evidence is.

19 Could you not -- would you be able to  
20 follow the law and not do that?

21 A Right. The newspaper is just a story.

22 Q All right. Mr. Smith, before I finish do you  
23 have any or anything you would like to say, any question  
24 you would want to ask me?

25 A No, sir.

1 MR. TOWNSEND: Okay. I  
2 appreciate your answering my questions.

3 I will pass the juror, Your Honor.

4 THE COURT: We are going to  
5 take about a five minute break, no more than that, we  
6 will proceed with the Defense.

7 So you can step down, stretch a little  
8 bit, we'll come get you.

9  
10 (Recess.)

11  
12 (The following occurred in the presence  
13 and hearing of the potential juror:)

14  
15 THE COURT: Mr. Old, are you  
16 going to talk to the juror?

17 MR. HINSON: I am.

18 THE COURT: All right. You  
19 may be seated.

20 And, sir, do you have any questions of  
21 us at all?

22 THE POTENTIAL JUROR: Not as  
23 yet.

24 THE COURT: Is there anything  
25 you don't understand or want clarified?

1 THE POTENTIAL JUROR: No, sir.

2 THE COURT: Okay. Then the  
3 Defense may proceed.

4

5 VOIR DIRE EXAMINATION

6 BY MR. HINSON

7

8 Q Mr. Smith, my name is Lance Hinson, along with  
9 Mr. Old I represent Mr. Wardlow in this matter.

10 I just want to go over some of the  
11 documents there in front of you, there's one of them  
12 entitled "Witness List?" (Indicating)

13 A Right.

14 Q Would you check? Is that a three-page  
15 document?

16 A Yes, sir.

17 Q There's several names listed on that document,  
18 these persons have been listed as being possible  
19 witnesses to this case as to certain events that happened  
20 or forensic tests that were done.

21 Would you look down through those lists  
22 of names and if you recognize any of those names, if you  
23 know the name or heard the name or whether you know this  
24 person would you let me know?

25 A The one "Harry Washington", is he from



1 Carthage?

2 Q I'm not sure where Harry is from. He's from  
3 -- he worked here in Mount Pleasant, there might be a  
4 "Washington" in that area that is a highway patrolman?

5 A There is. The highway patrolman in Carthage.

6 Q Okay. Mr. Washington, the one listed here is  
7 not a highway patrolman in Carthage.

8 A He's the one on the drug deal.

9 Q Do you know him personally?

10 A No.

11 Q Okay.

12 A I just knowed of him.

13 Q Know of him?

14 How do you know of him?

15 A Reading in the paper.

16 Q Is it related to this case or another case?

17 A No. Other things.

18 Q Do you have any opinion as to Harry  
19 Washington's credibility, whether he would be more  
20 credible than other police officers?

21 A No. I won't make a decision because I don't  
22 know him that well.

23 Q Never met him personally?

24 A No.

25 No, sir. I don't recognize no names.

1 Q Okay. Another document, Mr. Smith, up there  
2 is the indictment. I believe you looked at that  
3 document?

4 A Yes, sir.

5 Q Did you have the opportunity to read that  
6 document?

7 A Yes, sir.

8 Q It states the name of "Carl Cole", are you  
9 acquainted with Mr. Cole or any of his relatives?

10 A No, sir.

11 Q You know, you understand that an indictment  
12 alleges a charge against a defendant but is not evidence  
13 that you can consider if you were a juror in this case?

14 A No.

15 Go back to what I said, you have got to  
16 have evidence to prove anything.

17 Q Could you disregard the indictment if you were  
18 a juror and listen to the evidence that was presented to  
19 you at the time of trial and base your decision on what  
20 you heard and not what you may have read out of the  
21 indictment?

22 A Yes.

23 Q Based on the indictment a person is brought to  
24 trial, does that cause you to believe that the person is  
25 guilty because they are brought to trial?

1 A No.

2 Q Do you start with the proposition that a person  
3 is innocent until proven guilty?

4 A True.

5 Q Mr. Smith, there is another document,  
6 typewritten marked "Number 6", okay, it starts off, "All  
7 persons" there at the top. (Indicating)

8 A Right.

9 Q About a little better than halfway down a  
10 paragraph starts "A reasonable doubt", do you see that  
11 paragraph? (Indicating)

12 A Yes, sir.

13 Q Would you read that paragraph and the following  
14 two paragraphs and let me know when you get through?

15 MR. TOWNSEND: Your Honor, I  
16 want to object on this, the definition of reasonable  
17 doubt starts there at the paragraph above that where it  
18 says "It's not required" and I would like for him to read  
19 --if he's going to read I would like him to read that  
20 much so he would get the full definition, not just the  
21 bottom part there.

22 THE COURT: Since we have --  
23 I believe that's where we have been starting on everybody  
24 else, "The prosecution has the burden of proving the  
25 defendant guilty" so I will instruct the juror to back

1 up -- the second full paragraph where it says "The  
2 prosecution has the burden of proving the defendant  
3 guilty", start there and read to the bottom.

4 THE POTENTIAL JUROR: Okay.

5 Okay, sir.

6 MR. HINSON: Okay. Now, you  
7 understand that the prosecutor's burden is to prove to  
8 you in a criminal case matters beyond a reasonable doubt,  
9 is that your understanding of the law?

10 THE POTENTIAL JUROR: Yes.

11 Q (BY MR. HINSON) And for the Court Reporter's  
12 benefit would you answer out "Yes" or "No" or maybe where  
13 he gets it down for our record, please?

14 A Okay, sir.

15 Q I am sure we all have our own definition of  
16 "reasonable doubt" and you read this definition of  
17 "reasonable doubt" which I believe the Court will  
18 instruct you is the definition of reasonable doubt as  
19 used in a criminal case in the State of Texas today.

20 Is your definition basically the same  
21 as this definition of reasonable doubt?

22 A Yes, sir.

23 Q And if you were instructed to apply this  
24 definition of reasonable doubt could you accept that as  
25 your definition and apply the facts in this case to that

1 definition and make your decision based on this  
2 definition in Exhibit 6?

3 A Yes. I could use that.

4 I might have some feeling of my own on  
5 reasonable doubt.

6 Q What -- how would your definition differ?

7 A I may find something in there that I think has  
8 been said or something in the evidence that I would hang  
9 up on, you know.

10 Q You say "hang up on?"

11 Explain.

12 A It would stick in your mind is what I mean,  
13 may be small, it may be large, you know.

14 Q Are you saying a fact would be proven to you  
15 at a certain point during the trial?

16 A No. Not necessarily, that you would go -- keep  
17 -- your mind would be going back to that one point or  
18 something, you know, evidence must be proved -- I don't  
19 know how you would say -- evidence would still be there,  
20 you know, you would have to prove it but yet you would  
21 have to go along with the reasonable doubt like you have  
22 got wrote in here.

23 I can't explain exactly what I mean.

24 Q If a fact was proven to you during the course  
25 of the trial could you wait until the end of the trial

1 after you have heard all the evidence to make your  
2 decision in that case on that fact or do facts become  
3 established in your mind as the trial progresses?

4 A No. You would have to wait until you hear the  
5 whole evidence and give an individual a fair trial.

6 Q When you say you "go back to something that  
7 stuck in your mind", is there some way you can explain  
8 that?

9 I don't really understand what you mean.

10 A Well, you know, like you have somebody saying  
11 one thing and then somebody else says something else and  
12 somebody else says something else, you would have to  
13 figure the whole mess, which was the truth and which  
14 wasn't the truth and you would be waiting to find out  
15 what that was.

16 Q I'm not trying to pick on you, I'm just trying  
17 to get an answer that we can understand.

18 A I understand.

19 Q Where we started there on the paragraph "A  
20 reasonable doubt", the second sentence in there, "is the  
21 kind of doubt that would make a reasonable person  
22 hesitate to act in the most important of his own  
23 affairs."

24 Do you find that, that sentence?

25 A Yes.

1 Q And that's part of the definition of reasonable  
2 doubt.

3 If you listen to evidence, if you were  
4 a juror and you were instructed by the Court on this  
5 definition of reasonable doubt would you require the  
6 State to prove facts to you? Facts to you beyond what  
7 is required by the definition?

8 A No, sir. I would be -- it would come out, you  
9 know, what I would think.

10 Q Would it come out that it took less evidence  
11 than what is defined as a "reasonable doubt" to make that  
12 fact credible with you?

13 A No.

14 Q So you could keep the definition of reasonable  
15 doubt and apply the facts?

16 A Yes.

17 Q As to that definition?

18 A Yes, sir.

19 Q There is another document, it's got "Special  
20 Issues" at the top of it. (Indicating)

21 A Yes.

22 Q And I believe you have read those.

23 On Special Issue #1 there you talked a  
24 little bit about "probability as being more likely than  
25 not" and that's somewhere around your definition of

1 "probability?"

2 A Yes.

3 Q Somewhat more than 50 percent?

4 A Yes.

5 Q Can you explain how your definition of  
6 reasonable doubt is as compared to what your definition  
7 of credibility is?

8 A The only thing I could say about that would be  
9 that from the evidence didn't all mount up, you know,  
10 come to one area, I mean to one point, prove itself as  
11 the truth, if it's not the truth I can't go with it.

12 Q A fact proven beyond a reasonable doubt, is  
13 that a higher burden than a probability or about the same  
14 or in your own opinion?

15 A I would say "reasonable doubt."

16 Q Is a higher burden or about the same?

17 A They are about the same I would say.

18 Q And you have mentioned, "A probability" would  
19 be a little more than 50 percent?

20 A Yes.

21 Q Now, Special Issue #2 there, you see the  
22 highlighted words or it's in bold, "mitigating  
23 circumstances?" (Indicating)

24 A Yes.

25 Q And you read the definition of -- there at the



1 bottom, "Mitigating evidence is evidence that a juror  
2 might regard as reducing the defendant's moral  
3 blameworthiness?"

4 A Yes.

5 Q Now, during the course of the trial if certain  
6 evidence that may or may not be presented to you, we  
7 believe there will be some in each case that may come  
8 from either the State's side or from the Defense side and  
9 as you listen to that what we might consider mitigating  
10 evidence may not be mitigating evidence to you and this  
11 is the type of evidence that doesn't excuse the person's  
12 act for what he did but as the definition says, it might  
13 reduce his moral blameworthiness because of age or  
14 background, family upbringing, religious history, other  
15 factors that in your opinion may make a life sentence  
16 more appropriate than a death sentence?

17 A Yes, sir. I look at a person's upbringing and  
18 all is their own, they make their own, you know, I can't  
19 hold that as anything, you know, because they are the one  
20 that makes the decision on their upbringing.

21 And I had a hard row and my life has  
22 been straight.

23 Q If in a trial if someone presented evidence of  
24 someone's family history or background or how they were  
25 raised could you consider, but I'm not saying will you

1 consider, but could you consider that as mitigating  
2 evidence without rejecting that as mitigating evidence?

3 MR. TOWNSEND: Object to the  
4 form of the question, Your Honor. He's not required to  
5 consider anything as mitigating, he's just required to  
6 consider all that evidence and listen to it and then  
7 decide whether he considers it mitigating or not. He's  
8 not required to consider something mitigating if in his  
9 opinion it's not.

10 THE COURT: Sustained.

11 You may rephrase it.

12 MR. HINSON: Would you  
13 consider as a juror in a trial in a capital murder trial  
14 say evidence of someone's history or background is  
15 presented, in your own mind are you going to reject that  
16 evidence as mitigating evidence?

17 MR. TOWNSEND: Again, Your  
18 Honor, he's calling on him to tell what he would do, it's  
19 perfectly permissible for him to reject that as  
20 mitigating evidence if he chooses to. He's only required  
21 to listen to it and consider.

22 As long as he will listen to it and  
23 consider it, that he has already testified that he would  
24 do.

25 THE COURT: I think he has a

1 further obligation to listen to it, consider it and he's  
2 not required to give it full force and effect. There's  
3 a lot of things that might come out in the trial, a  
4 person's age, background, psychological state of mind.  
5 The law doesn't say that this is and this is not a  
6 mitigating circumstance, the law says we should all keep  
7 our mind open and if we hear this and we think it's  
8 mitigating give it effect, if we don't think it's  
9 mitigating we can dismiss it.

10 But what the Defense is asking you; is  
11 there certain areas that you are just not even going to  
12 listen to and consider because you have your mind made  
13 up, it wouldn't have any effect on you at all or will you  
14 listen and give it what effect or give it effect if you  
15 believe after hearing it that it did have some effect on  
16 the action?

17 THE POTENTIAL JUROR: I will  
18 just have to wait and hear, it goes with the evidence.

19 THE COURT: Some people tell  
20 us, "I couldn't ever listen to that psychiatrist."

21 THE POTENTIAL JUROR: I can't  
22 say that because my girl is a nurse.

23 THE COURT: That's the point  
24 he's trying to make, the law requires we listen to  
25 evidence, if we think it's mitigating sufficient to

1       justify a life sentence we give it that effect, we listen  
2       to it and not find it mitigating to give a life sentence  
3       then we can disregard it.

4                       I just want to make sure that you are  
5       not having your mind closed to these areas before we even  
6       start.

7                       THE POTENTIAL JUROR: No, sir.

8                       THE COURT: Mr. Hinson.

9                       MR. HINSON: Mr. Smith, what  
10       I'm trying to understand, you are talking about your  
11       upbringing, is that going to influence your decision as  
12       a juror in this case to where you would be more inclined  
13       to not consider evidence of family background or history?

14                      THE POTENTIAL JUROR: No. But  
15       it's still a thought, if I can do it somebody else can  
16       do it. There's no --

17       Q               (BY MR. HINSON) If you can do what?

18       A               If I come from hard knocks they can do the hard  
19       knocks, you know.

20                      I just took the right road, I feel  
21       everybody else can, too, if I did why can't they do it,  
22       you know?

23                      It makes you think.

24       Q               Does that put you as a juror in a case in a  
25       position of wanting -- where a person doesn't take the

1 right road -- of wanting to assess the death penalty more  
2 than a life sentence?

3 A No, sir.

4 Q During this trial you might hear evidence  
5 regarding age or as the Judge stated a psychological  
6 test, would you listen to that evidence and consider that  
7 evidence without rejecting it once the witness took the  
8 stand?

9 A Yes.

10 Q And when I say "that evidence", evidence of  
11 psychological tests, could you consider that, listen to  
12 it?

13 A Yes.

14 Q Religious upbringing?

15 A Yes.

16 Q And I believe we have sort of walked around the  
17 personal history or the family background; you would be  
18 in the same position on that evidence?

19 A Yes.

20 Q Evidence of age, age of a person at the time  
21 an incident occurred?

22 A I mean that to me he knows right from wrong  
23 there I consider there on his age.

24 Q Are you saying you couldn't consider age?

25 A No, sir.

1                   Because he should know right from wrong  
2                   if he's old enough to know it.

3                   MR. TOWNSEND: Your Honor, I  
4                   ask that the Court rephrase that in such a way that the  
5                   juror understands the difference between "considering and  
6                   considering" and, you know, "considering in giving  
7                   mitigating weight."

8                   THE COURT: I think the  
9                   question was clear enough. I don't think it would be  
10                  proper for me to intercede.

11                  MR. HINSON: Mr. Smith, you  
12                  talked a little bit about your Military -- you were in  
13                  the Air Force?

14                  THE POTENTIAL JUROR: Navy and  
15                  Air Force.

16                  Q           (BY MR. HINSON) What years were you in?

17                  A           I went in the Navy in 1956, got out -- no --  
18                  I went in in '53, got out in '56, went in the Air Force  
19                  in '56 and got out in '72.

20                  Q           And you said that as a juror and a witness you  
21                  were involved in some court marshal activity?

22                  A           Yes.

23                  Q           What was your job in the Navy and Air Force?

24                  A           Well, Navy I was a Bosun's Mate and the Air  
25                  Force I worked in Civil Engineering.

1 Q Did they send you to school? Did you get any  
2 advanced degrees?

3 A I went to some college on my own, I did go to  
4 some technical schools.

5 Q So what you did for the Navy and Air Force was  
6 not related to police enforcement or --

7 A No, sir.

8 Every once in awhile you would have the  
9 duty of escorting somebody somewhere, it's a detail that  
10 you would have.

11 Q I worked for the Army for a little while but  
12 I have never been in the Service.

13 The Military Police, is that a branch  
14 within that you would not have been part of the Military  
15 Police and then also worked as an engineer, correct?

16 A No. That's a separate -- what they call "AFS  
17 Job Title."

18 Q You were never in that part?

19 A No.

20 Q Can you recall -- can you recall the specific  
21 facts that related to the court marshal you were in as  
22 a juror and a witness, "insubordination" or out on leave,  
23 they committed some offense or some other -- theft on the  
24 base, do you recall what that might have related to?

25 A Well, one of them was this one individual

1       couldn't advance and we was making -- he got in a little  
2       trouble with another superior, a NCO was getting --  
3       insubordination is what he was going for, one of them and  
4       the other one --

5       Q               Were you a juror on that case?

6       A               I was a witness because he worked for me.

7                       And then the other one was -- I sit in  
8       on an individual trying to commit murder trying to escape  
9       from jail.

10      Q               You sat as a juror in this case?

11      A               I sat on the panel.

12      Q               You weren't selected as a juror?

13      A               No. We had a panel, you have -- they have got  
14      the lawyers and so many enlisted men and so many officers  
15      on the panel.

16                      THE COURT:     What is the  
17      panel's duty?

18                      THE POTENTIAL JUROR:   Same as  
19      juror's, make the decision, what punishment they should  
20      get.

21                      THE COURT:   So you are saying  
22      the panel that you were on would be what we call -- would  
23      call "the jury?"

24                      THE POTENTIAL JUROR:   Right.

25                      THE COURT:   I have never been



1 in the Military so I don't understand some of this  
2 either.

3 MR. HINSON: Do you recall  
4 what the decision that the panel made was?

5 THE POTENTIAL JUROR: He got  
6 -- I can't remember how many years he got in Leavenworth.

7 Q (BY MR. HINSON) He was convicted of, either  
8 was charged with --

9 A He was charged -- I can't remember how it all  
10 went.

11 He went to Leavenworth.

12 Q For several years, several months?

13 A "Years."

14 THE COURT: Excuse me again,  
15 Mr. Hinson, I just want to clarify in my mind; did the  
16 panel make the decision as to whether the guy did what  
17 he was accused or did the panel just decide punishment?

18 THE POTENTIAL JUROR: We  
19 decided that he was guilty.

20 THE COURT: And then decided  
21 punishment?

22 THE POTENTIAL JUROR: And then  
23 decided punishment.

24 THE COURT: Thanks.

25 THE POTENTIAL JUROR: With

1 the presiding judge of the panel, penal officer.

2 MR. HINSON: And that was some  
3 type of murder?

4 THE POTENTIAL JUROR: Attempted  
5 -- what he done, he took some firewood and tried to knock  
6 this guard in the head, this guard happened to work for  
7 me, he was down on detail.

8 Q (BY MR. HINSON) Mr. Townsend I believe  
9 informed you or I believe informed you a little bit about  
10 a life sentence and what the effect of parole might have  
11 on a life sentence.

12 You understand in a capital case based  
13 on the indictment if those allegations were proven and  
14 the defendant was found guilty of capital murder his  
15 possibility as punishment are life in prison or the death  
16 penalty?

17 A Yes, sir.

18 Q Do you understand that?

19 A Yes.

20 Q And in this case based on the date of the  
21 offense I believe the Court would instruct you that a  
22 life sentence would mean that the Defendant, if he was  
23 convicted in the guilt or innocence phase, would have to  
24 serve a minimum of 35 calendar years as punishment?

25 A Yes, sir.

1 Q Before he would be eligible for parole?

2 A Yes, sir.

3 Q Not that he would get out in 35 years or in  
4 40 years or ever but that's when he becomes eligible.

5 If you are selected as a juror in this  
6 case and knowing that life is 35 years plus whatever  
7 parole does, but knowing that the Court is going to  
8 instruct you that life equals life, that if you assess  
9 a life penalty that the person is put in jail for his  
10 life, knowing what the parole laws are are you going to  
11 lean toward assessing the death penalty in a capital  
12 murder case?

13 A It depends on the evidence.

14 You can't make your mind up until you  
15 hear all the evidence.

16 Q Knowing what the parole law is, that is a  
17 maximum -- no, not a "maximum", a "minimum" of 35  
18 calendar years, is that going to effect your deliberation  
19 as a juror in what punishment is assessed?

20 A No.

21 Q You would give a defendant in a capital murder  
22 case, you would equally consider a life sentence versus  
23 the death penalty?

24 A Yes, sir. Consider it, weigh it which way.

25 Q Based on any Military experience or your own

1 life experience do you lean heavily toward assessing the  
2 death penalty in a capital murder case?

3 A I can't really say until I hear all the  
4 evidence, you know, you can't make up your mind, you  
5 know, until you know the whole facts.

6 THE COURT: Thirty minutes.

7 MR. HINSON: I believe you  
8 talked a little bit with Mr. Townsend about the  
9 indictment and the failure of the State to prove the  
10 robbery?

11 THE POTENTIAL JUROR: Yes,  
12 sir.

13 Q (BY MR. HINSON) And you understand that if the  
14 robbery was not proven to the jury then the jury should  
15 find the defendant guilty of the lesser included offense,  
16 murder?

17 A Yes.

18 Q Do you understand?

19 And you went over the range of  
20 punishment for murder as being from five to 99 years or  
21 life in prison and the minimum five years probation?

22 A Yes, sir.

23 Q Could you consider in a murder case, could you  
24 consider that range of punishment?

25 A Yes, sir.

1 Q Can you explain your personal feeling about  
2 probation?

3 A Probation has been a lot of good people, you  
4 know, went to prison, come out and lived a straight life  
5 and there are others went right back in a few days after  
6 so I really have no thought on it which way you should  
7 go with it.

8 Q Is probation appropriate in some cases and not  
9 appropriate in other cases?

10 A I would say yes.

11 Q In your own life experience are you aware of  
12 anyone that ever received probation that you think did  
13 not deserve probation?

14 A Not that I can recollect.

15 Q Do you have any bias against a person serving  
16 probation?

17 A No, sir.

18 Q The Fifth Amendment to the United States  
19 Constitution allows a defendant in a criminal case the  
20 right not to testify if he so chooses and I listened to  
21 you as you explained your feeling on that previously but  
22 I'm not sure exactly -- you talk about doubt in the  
23 juror's mind and I'm not exactly sure what you meant by  
24 that. Usually -- let me back up; that flow chart?  
25 (Indicating)

1 A Yes.

2 Q Do you see there, it should have as Phase I at  
3 the top, "jury selection?"

4 A Yes.

5 Q But it's for this Phase I the guilt and  
6 innocence? (Indicating)

7 A All right.

8 Q All right. And guilt and innocence, as a juror  
9 the first part of the evidence that you would hear, you  
10 would determine whether a person was guilty or innocent  
11 of the charge and if he was not guilty the trial would  
12 end but, if he was found guilty you would go to the next  
13 phase, the punishment phase. (Indicating)

14 A Yes.

15 Q So that's how the process would work there.

16 Now, in the Phase I, the guilt and  
17 innocence phase the defendant has the Fifth Amendment  
18 right not to testify if he does not want to testify, it's  
19 his decision.

20 And there may be several factors of why  
21 he did not testify.

22 As you listen to the evidence and maybe  
23 you would want to hear testimony from the defendant in  
24 Phase I but he just doesn't testify, would you hold that  
25 against the defendant in any manner?

1 A No.

2 I still believe a man should try to  
3 defend -- you know, testify for hisself, you know.

4 Q Is that belief going to effect your  
5 deliberation toward a verdict in any way?

6 A No, sir.

7 Q If he doesn't testify for himself are you going  
8 to lean more heavily toward finding the defendant guilty?

9 A No.

10 Q If he does not testify in Phase I you would  
11 give him an equal start with the State?

12 A Yes.

13 Still you would have that feeling, why  
14 didn't he testify, like I said awhile ago, you know.

15 Q So let's assume in a capital murder trial,  
16 Phase I, the defendant was found guilty and you went to  
17 Phase II, the punishment phase, that is what punishment  
18 should you assess, a life sentence or the death penalty.

19 A All right.

20 Q And there is evidence presented to you and  
21 again you found him guilty, you said you could, you know,  
22 you would not hold that against him as to the guilt or  
23 innocence in Phase I.

24 In Phase II there was evidence presented  
25 to you and maybe deep down you wanted the defendant to

1 testify, you said you had that doubt in your mind?

2 A Yes, sir.

3 Q If in Phase II the defendant did not testify  
4 there, would that cause you to lean more heavily toward  
5 answering your questions to assess the death penalty?

6 A No, sir.

7 But there would be still the thing, why  
8 didn't he defend himself?

9 Q You understand in a criminal case that the  
10 State has the burden of proving that the defendant is  
11 guilty beyond a reasonable doubt and we have gone over  
12 that definition of reasonable doubt and before you make  
13 up your mind whether or not it has been proven to you  
14 beyond a reasonable doubt, the evidence is presented but  
15 the defendant fails to testify, would you require  
16 evidence from the defendant for you to consider whether  
17 or not the State had proven their case beyond a  
18 reasonable doubt?

19 A No.

20 But still, why didn't he testify?

21 Q Now, I believe you stated previously that in  
22 your own mind you could set that aside that he did not  
23 testify and you wouldn't hold that against him?

24 A No, sir. I wouldn't.

25 Q But I guess subjectively is that that he didn't



1       testify going to be in the back of your mind?

2                       I think that's what you are saying?

3       A               Yes.

4       Q               Is it possible that this doubt, I believe you  
5       characterized it as "down in a juror's mind", is it  
6       possible that will effect your deliberation as a juror?

7       A               No, sir.

8       Q               We talked a little bit about confessions,  
9       admissions during the course of a trial, sometimes  
10      there's confessions, written confessions taken or given  
11      by the defendant, admissions made in open court or  
12      whatever, witnesses have heard.

13                     Assume that there is a trial going on  
14      and there is a written confession and you read that  
15      confession and you find it to be very truthful, seems  
16      very honest to you and you consider it to be exactly what  
17      occurred but there is evidence presented to you that that  
18      defendant that you know is guilty because you think his  
19      statement is true, that the officers or police department  
20      or someone tricked him into giving that confession.

21                     Can you set that confession aside and  
22      find that defendant not guilty knowing that he's guilty  
23      because you believe his statement, can you set that aside  
24      and find him not guilty?

25      A               Well, if the evidence points toward the

1 confession I would find guilty.

2 Q If there was no evidence offered other than  
3 this confession, that there was no witnesses to the  
4 crime, let's call it "the perfect crime", you have  
5 probably watched Perry Mason, he seems to solve the  
6 perfect crime all the time, and the only evidence is that  
7 somehow or another the defendant was tricked by the  
8 police in giving a confession and to you the confession  
9 is accurate, everything that is written in there, you  
10 don't have any problem that it's not the truth, that it's  
11 the truth as you understand it?

12 A Yes.

13 Q But because they tricked the defendant it's  
14 involuntary, can't be considered as evidence and there's  
15 no other evidence, you said, you know, "There's other  
16 evidence that supports his confession" but in this case  
17 there's no other evidence other than his confession.

18 Can you set that aside and find that  
19 defendant when in your own mind that he's guilty, can you  
20 find him not guilty?

21 A He's not proven guilty, that wouldn't prove him  
22 guilty, really.

23 THE COURT: Let me give you  
24 an illustration to point out what he's saying; let's say  
25 the man is sitting on the side of a building next to a

1 building, the police come up and say, "What are you doing  
2 here?"

3 Says, "Oh, I'm just sitting."

4 Says, "You didn't break in there or  
5 anything?"

6 "No. No. I didn't do anything but a  
7 couple of weeks ago I killed a guy but I haven't done  
8 anything today."

9 They take him in and he writes out his  
10 statement but they don't give him any kind of warnings,  
11 your right to remain silent, they don't give him anything  
12 and they bring him to trial and the only evidence we have  
13 is he said, "A week ago I killed someone."

14 And since that confession is not  
15 voluntary, since that confession doesn't meet our rules  
16 you couldn't consider it so without our statement they  
17 don't have any evidence, they don't have any evidence of  
18 a body, they don't have any evidence whatsoever.

19 Would you be able to set aside that  
20 statement he made since it was not according to the law  
21 and find him not guilty?

22 THE POTENTIAL JUROR: Yes.

23 THE COURT: Thank you, sir.

24 THE POTENTIAL JUROR: I  
25 understand.

1 THE COURT: I just wanted to  
2 give you sort of a fact situation to illustrate a point  
3 that he was trying to make.

4 THE POTENTIAL JUROR: Thank  
5 you.

6 MR. HINSON: One step further  
7 with that; you said if there was other evidence to  
8 support this confession that you would find him guilty  
9 and disregard the confession and in another fact  
10 situation the defendant makes a confession but there is  
11 also other evidence to support that he's guilty and as  
12 we talked about the confession, you find it to be true,  
13 that the other evidence supports the confession but you  
14 don't find it to be voluntary; can you disregard that  
15 confession in that situation and look at the evidence  
16 that was presented and hold the State to the burden of  
17 proof of proving to you beyond a reasonable doubt that  
18 the defendant is guilty?

19 THE POTENTIAL JUROR: Yes.  
20 Yes.

21 Q (BY MR. HINSON) And you would not consider  
22 this confession as you considered the other evidence that  
23 supported it?

24 A Unless the man made his confession in the  
25 Court.

1 Q Okay. The written confession, you would not  
2 -- you could --

3 A I could --

4 Q -- you would know it's there but you could  
5 disregard it and look at the other evidence in making  
6 your assessment?

7 THE COURT: Five minutes, Mr.  
8 Hinson.

9 MR. HINSON: Mr. Smith, I know  
10 you haven't been a police officer, are you related to  
11 anyone -- your daughter, you said was a nurse, do you  
12 have a son-in-law or anyone that is in law enforcement?

13 THE POTENTIAL JUROR: No. All  
14 I have is a son which is in the Navy, he pulls shore  
15 patrol once in awhile.

16 Q (BY MR. HINSON) But it's not his career as a  
17 Military Police?

18 A No. It's not. No.

19 Q During the course of the trial we showed you  
20 a long list, a Witness List, I am sure that you noticed  
21 that most of those were connected with some law  
22 enforcement agency.

23 There will be other witnesses testify  
24 that aren't connected with law enforcement agencies,  
25 there might be a preacher, a pastor, a minister, maybe

1 a psychologist or a psychiatrist testify along with  
2 police officers, there may be just the old lumber yard  
3 worker, you know, girl that works down at the Dairy  
4 Queen.

5 When the girl at the Dairy Queen  
6 testifies she says one thing and the police officer, he  
7 says another.

8 That happens in a lot of cases.

9 Okay. As a juror when you are sitting  
10 and listening to the evidence do you give a police  
11 officer's testimony a little more credibility than other  
12 witnesses in the case?

13 A Yes and no.

14 Q Can you explain what you mean?

15 A Well, the policeman may not be there, the Dairy  
16 Queen worker may be there and he's going on hearsay, the  
17 police officer or vice versa, you have to see which one  
18 was actually there or what statement was said to them and  
19 so on and so forth.

20 You can't downgrade a Dairy Queen  
21 worker, either.

22 Q All right. Let's assume there's a hundred  
23 people in a circle here and we show them one event on the  
24 TV and I'm sure you would agree with me that we are going  
25 to have a lot of different stories about that event that

1 occurred?

2 A Yes.

3 Q And witnesses are the same way, they have  
4 different recollections of how events occur?

5 A Yes, sir.

6 Q "Did the car run the red light, well, I saw it  
7 was red and the other one saw it was green" so that's the  
8 same situation we are in, perspective, the same, the  
9 question is, though, does one have anymore credibility,  
10 does the police officer have any more credibility with  
11 you than another witness?

12 A I would say a police officer should have more  
13 credibility -- "does have more credibility", I'll put it  
14 that way, because that's his training.

15 Q Okay. And "credibility" meaning he's truthful  
16 in relating a story to you?

17 A Yes.

18 Q Would a pastor, preacher, minister have any  
19 more credibility with you than another witness in the  
20 case?

21 A No, sir.

22 Q Would a psychiatrist or psychologist have any  
23 more or less credibility with you?

24 A No.

25 Q You would start them off on equal footing?

1 A They would be all equal.

2 Q I believe on October the 6th when the jury  
3 panel first came in there has been articles in the  
4 newspaper, you have seen the questionnaire, the  
5 indictment, we have gone over several things.

6 Based on all you have seen and heard  
7 have you formed any opinion as to the defendant's guilt  
8 or innocence as you sit there right now?

9 A No, sir. I have no evidence.

10 Q So if you were picked as a juror you would  
11 start the State off on the same place that you would  
12 start the defendant?

13 A Same level.

14 Q And it's up to the State to prove to you beyond  
15 a reasonable doubt the defendant's guilt?

16 A Both sides have to prove it.

17 Q And you don't require the defendant to testify?

18 A Well, just looking back again, the defendant,  
19 if I do something wrong I'm going to try to defend  
20 myself.

21 Q Do you expect a defendant to offer evidence,  
22 offer their evidence to defend themselves?

23 A If there is some. Yes. If they have any.

24 MR. HINSON: Pass the juror,  
25 Your Honor.



1 THE COURT: Sir, if you will  
2 step out for a few minutes we will discuss your jury  
3 service and I will give you some more instructions  
4 shortly.

5 THE POTENTIAL JUROR: Okay,  
6 sir.

7  
8 (The following occurred outside the  
9 presence and hearing of the potential juror:)

10  
11 THE COURT: Does the State  
12 have any challenges?

13 MR. TOWNSEND: None, Your  
14 Honor.

15 THE COURT: The Defense?

16 MR. OLD: Yes, Your Honor.

17 Your Honor, may I make them -- would I  
18 offend you if I make them sitting down?

19 THE COURT: No. Go ahead.

20 MR. OLD: The Defendant would  
21 challenge for cause the juror Carl Eugene Smith, original  
22 number 307, renumbered 38 and as grounds for challenge  
23 for cause would show the Court that he expressed by  
24 testimony that merely because a man was a peace officer  
25 he thought he was more credible for truthfulness over

1 another witness and in doing so has expressed a prejudice  
2 against the Defendant in this case.

3 As to our second challenge for cause;  
4 the witness testified, the juror testified that while he  
5 would try not to consider a defendant not testifying he  
6 would still have doubt, said several times he could set  
7 it aside and his last statement from the witness stand  
8 concerning the law, he expected a man to defend himself  
9 if he was innocent.

10 And that puts a burden on the defendant  
11 which is not required by law and our challenge for cause  
12 would be that he expressed a prejudice against the laws  
13 of the United States and the State of Texas as to the  
14 Fifth Amendment and the right not to testify and in doing  
15 so has said he could not follow the Court's instructions.

16 Challenge number three; the witness  
17 expressed a prejudice against the defendant and a  
18 prejudice against evidence in that he said "I could not  
19 consider age as evidence."

20 Those would be our three challenges.

21 MR. HINSON: Your Honor, I  
22 think we have --

23 MR. OLD: Go ahead.

24 MR. HINSON: Additionally he  
25 equated the definition of "reasonable doubt" equalling

1 "probability, more likely than not" of which is a matter  
2 of law it is not.

3 THE COURT: Any response from  
4 the State?

5 MR. TOWNSEND: Let me take the  
6 last one first on "beyond a reasonable doubt", he said  
7 he could follow the law as to that definition, Your  
8 Honor, he stated that on a couple of occasions as to his  
9 statement, not that he would not consider age as  
10 evidence, his statement was that he would not consider  
11 age -- it was unclear to me from the -- with me and from  
12 his testimony with the Defense whether he meant he would  
13 not consider it as mitigating or he would not consider  
14 it period.

15 I think he misunderstood what they were  
16 asking.

17 I would like the Court to clear that up  
18 with him.

19 I think he was -- his responses on that  
20 were equivocating.

21 As to the police officer, his statement  
22 -- I think that he would give more credibility because  
23 they are trained or something like that.

24 THE COURT: That's the way I  
25 recall it but I will talk to him.

1 MR. TOWNSEND: And I would  
2 like the Court to clear that up as well.

3 As to his Fifth Amendment answer  
4 regarding -- respecting the defendant, he said on several  
5 occasions that whether the defendant testified or not  
6 would have no effect on his verdict. He did not ever  
7 say he would hold that against the defendant, he just  
8 said he would expect that.

9 Well, I think most people would expect  
10 that.

11 THE COURT: I think so, too.  
12 I do not think he's disqualified but I will talk to him  
13 in that area, I will talk to him in each of the areas.

14 Frankly the latest court cases I have  
15 read unless something has come out in the last two weeks  
16 do not require a juror to give age any mitigating effect  
17 period, they did for awhile and then they came out and  
18 said they are not going to so I don't know what their  
19 position is this week.

20 MR. OLD: That's not the  
21 objection, the objection is he said he would reject age  
22 as evidence.

23 THE COURT: Again, I'm not  
24 concerned with that but I'm going to talk to him on all  
25 four issues.

1 Bring back Mr. Smith.

2  
3 (The following occurred in the presence  
4 and hearing of the potential juror:)

5  
6 THE COURT: Mr. Smith, I have  
7 got a couple of questions for you.

8 THE POTENTIAL JUROR: Okay.

9 THE COURT: I'm going to be  
10 kind of repetitive but I told you when I kind of  
11 explained the law to you and whether you can follow it  
12 and some of your answers have been a little contradictory  
13 so I want to get some clarification in my mind if I  
14 could.

15 Let's talk about police officers first;  
16 you said you wouldn't start out a preacher or  
17 psychologist or anybody else ahead of the other, you  
18 indicated you might start a police officer out ahead of  
19 the others but you were also talking about a police  
20 officer's training.

21 Now, our law says that all witnesses are  
22 to be started out equal, no one had a head start.

23 Now, after you listen to a witness you  
24 judge that witness's credibility and truthfulness by  
25 looking at his or her background, training and interest

1 in the case.

2 If a person in a civil lawsuit is  
3 seeking money and they are testifying what someone else  
4 did and why he should be paid you might want to weigh  
5 that against somebody that has nothing at stake, that is  
6 just going to tell you what he or she observed.

7 We all probably believe that police  
8 officers are trained to observe, maybe they are and maybe  
9 they aren't, you may have some police officers that are  
10 highly trained, you may have some police officers,  
11 reserve deputies, maybe they haven't had any training.

12 Now, if you are going to give a head  
13 start to a police officer I'm not going to take issue  
14 with that, I just need to know whether or not you are  
15 going to be able to start all witnesses equal or whether  
16 you are going to be able to give a police officer a head  
17 start over all witnesses.

18 THE POTENTIAL JUROR: No. All  
19 I meant awhile ago when he was talking about a Dairy  
20 Queen worker and a police officer, I believe the police  
21 officer has more training and so forth than the Dairy  
22 Queen worker does as his judgment.

23 THE COURT: If you found out  
24 the Dairy Queen worker had been a police detective in New  
25 York for 20 years and was retired and the other police

1 officer was a rookie, that might very well change your  
2 opinion?

3 THE POTENTIAL JUROR: Yes,  
4 sir.

5 THE COURT: So are you telling  
6 me that you will listen and weigh and hear their  
7 qualifications, decide who is the most believable and  
8 weigh their testimony?

9 THE POTENTIAL JUROR: Yes,  
10 sir.

11 THE COURT: You are not going  
12 to believe a police officer just because he's a police  
13 officer?

14 THE POTENTIAL JUROR: True.

15 THE COURT: Let's go back to  
16 this "reasonable doubt", you were told that reasonable  
17 doubt is what is on that long piece of paper, our courts  
18 did not define "reasonable doubt" for us for years, we  
19 have gone a hundred years or more without definitions and  
20 then a few years ago they decided that they were going  
21 to define it and they defined it in that very long  
22 paragraph there that we had you read. (Indicating)

23 THE POTENTIAL JUROR: Yes.

24 THE COURT: That's it right  
25 there.

1                   Now, "reasonable doubt", they say it  
2                   basically is the prosecution has the burden of proving  
3                   to you not beyond all doubt because all doubt basically  
4                   means you would have to be a witness, but beyond any  
5                   reasonable doubt that the person is guilty as to what he  
6                   or she is accused, they say that reasonable doubt is the  
7                   kind of doubt that would make a person hesitate to act  
8                   in the most important of their own affairs, kind of like  
9                   open heart surgery, you took all the factors, weighed  
10                  them, you had your surgery.

11                  Maybe you had some hesitation, maybe you  
12                  didn't, but you weighed the factors and decided that's  
13                  what you had to do.

14                  As a lawyer and Judge if I told you  
15                  based on your symptoms you probably needed open heart  
16                  surgery maybe you would have hesitated and maybe sought  
17                  some other opinion..

18                  That's what we are trying to do, let's  
19                  make sure before we make a decision, and we are as sure  
20                  as we can be, as sure as we can but coming up -- without  
21                  coming up with some incredible situation, maybe they  
22                  might say that "A guy came down from another planet",  
23                  that's not credible.

24                  But you said that "reasonable doubt"  
25                  meant about the same thing as the word "probability" in



1 that Special Issue so I want you to go to that next page,  
2 the one right there, the one there in your hand, and  
3 there is a Special Issue, let me look at mine and make  
4 sure I have got it right, it says, "Do you find from the  
5 evidence beyond a reasonable doubt that there is a  
6 probability that the defendant would commit criminal acts  
7 of violence?"

8 You say to you "reasonable doubt" and  
9 "probability" were the same.

10 Our law says that "probability" means  
11 "more likely than not."

12 Our law says that "reasonable doubt" is  
13 "more than just more likely than not."

14 "More likely than not" could be 51  
15 percent or more?

16 THE POTENTIAL JUROR: Yes.

17 THE COURT: Most people equate  
18 "reasonable doubt" as way up there, maybe in the 90s,  
19 there's no legal place that you put "reasonable doubt"  
20 but the law says the standard of "reasonable doubt" is  
21 much higher than "probability."

22 Are they the same to you or are you  
23 going to equate "probability" and "reasonable doubt" as  
24 both around 51 percent?

25 THE POTENTIAL JUROR: I would

1 say around 51.

2 THE COURT: So you are saying  
3 if the State can prove more likely than not then to you  
4 they have met their burden of "reasonable doubt?"

5 THE POTENTIAL JUROR: One  
6 side, the other side, I have to hear all the evidence  
7 before I can hear any evidence, keep an open mind.

8 THE COURT: Okay. Thank you,  
9 sir.

10 You may step down.

11  
12 (The following occurred outside the  
13 presence and hearing of the potential juror:)

14  
15 THE COURT: Sustained.  
16 Tell him he's excused, we appreciate him  
17 coming in.

18 I will see you guys at 1:00 o'clock.

19  
20 (Noon recess.)

21  
22 (The following occurred outside the  
23 presence and hearing of any potential juror:)

24  
25 THE COURT: Let's get on the

1 record.

2 There are no jurors present.

3 It has come to the Court's attention  
4 that some people may have been going through the Court's  
5 file, the Court's file is public record but since there  
6 are several things in the Court's file that could  
7 possibly reflect upon the Defendant's ability to have a  
8 fair trial in this county I am going to order that the  
9 file be sealed and that no one have access to this file  
10 other than the two District Attorneys working on this  
11 case, Mr. Lee and Mr. Townsend, the two Defense Attorneys  
12 working on the case, Mr. Old and Mr. Hinson and the  
13 District Clerk and his employees.

14 No other person is to have access to  
15 that file period without further order of the Court.

16 Let's bring in our next juror.

17  
18 (The following occurred in the presence  
19 and hearing of the potential juror:)

20  
21 RICHARD DEAN WILTSE, Potential Juror #476,  
22 was called as a Potential Juror and, having been  
23 previously sworn by the Court, testified as follows:  
24

25 THE COURT: How are you doing,

1 sir?

2 THE POTENTIAL JUROR: Fine.

3 THE COURT: Go ahead and take  
4 your seat.

5 First let me thank you for coming in on  
6 short notice, we had some other people scheduled and we  
7 did some changes and had to get some late scheduling done  
8 so thank you for your cooperation.

9 Sir, are you "Richard Wiltse?"

10 THE POTENTIAL JUROR: Yes.

11 THE COURT: This is juror 41.

12 I am Gary Stephens, I'm presiding over  
13 the trial.

14 We have two District Attorneys that are  
15 working on behalf of the State, one is in trial in  
16 another county, his name is Randall Lee, the lead  
17 attorney, the one that is actually in charge and  
18 presenting the evidence is present, that's Mr. Richard  
19 Townsend from Morris County.

20 We have two Defense Attorneys who are  
21 both present, Mr. Bird Old, III.

22 MR. OLD: Good afternoon.

23 THE COURT: And Mr. Lance  
24 Hinson.

25 We have the Defendant seated next to Mr.

1 Hinson, his name is Billy Joe Wardlow.

2 Now, sir, the lawyers have read your  
3 questionnaire and they are familiar with your answers,  
4 they are going to talk to you about some of those answers  
5 and they are also going to talk to you about the  
6 principles of law and about the issues involved in a  
7 death penalty case.

8 You will be asked a lot of questions and  
9 the answers will let us know whether or not to put you  
10 on the jury.

11 In order to be a juror you must be able  
12 to understand, follow the law so we are going to ask you  
13 first, we'll explain the laws to you and we will ask  
14 whether or not you can follow that law.

15 But we have found, sir, that we need to  
16 know more about jurors in a death penalty case, more than  
17 just, "Yes, I can" or "No, I can't follow the law."

18 We want to know what those jurors think  
19 about our laws and about the issues that they will be  
20 passing on.

21 The only way as lawyers we know to find  
22 out what is in your mind is to ask you a lot of questions  
23 so that's what's going to happen.

24 We may give you some facts, if we do we  
25 are not using -- we are just making up facts sometimes

1 to try to illustrate a point and I want you to understand  
2 that if we do bring up some facts to illustrate a point  
3 it has nothing to do with the alleged facts of this case.  
4 The law prohibits us from talking about the facts of this  
5 case, that's why we are going to have a trial.

6 So if we give you a fact situation it's  
7 just a hypothetical to try to illustrate a point.

8 But, sir, there aren't any right or  
9 wrong answers to these questions, there's no right or  
10 wrong opinions, as a citizen you certainly have the right  
11 to your opinion, it's just that we need you to share  
12 those opinions with us so we can decide whether or not  
13 this is a task you should undertake.

14 The trial will last probably two weeks  
15 and we will not start testimony, meaning the trial, until  
16 after the first of the year.

17 Do you know of any reason that you could  
18 not sit for a two-week period as a juror if chosen in  
19 January of next year?

20 THE POTENTIAL JUROR: No, sir.  
21 Not right now.

22 THE COURT: Do you have any  
23 questions before we proceed?

24 THE POTENTIAL JUROR: No.

25 THE COURT: All right, again,

1 just be as open and honest with us as you can and just  
2 remember we don't really care what your opinions are and  
3 I don't mean to be rude by that but we very much care to  
4 understand those opinions and the only way we can find  
5 out is for you to open up and share them with us.

6 THE POTENTIAL JUROR: Okay.

7 THE COURT: Mr. Townsend.

8  
9 VOIR DIRE EXAMINATION

10 BY MR. TOWNSEND

11  
12 Q Mr. Wiltse, my name is Richard Townsend and as  
13 the Judge said I represent Morris County as the District  
14 Attorney prosecuting this case.

15 As you know from your earlier jury  
16 service in October when the Judge talked to the group we  
17 are actively seeking the death penalty in this case and  
18 we need to have the type jurors who can keep an open mind  
19 as to the possible punishment in a capital murder case.

20 In Texas if a defendant is found guilty  
21 of capital murder they will receive one of two sentences,  
22 either a life sentence or the death penalty.

23 And we need jurors who can keep an open  
24 mind as to actually what the appropriate sentence should  
25 be and not just automatically say, "Well, he's guilty,

1 I'm going to give a life sentence, if he's guilty I'm  
2 going to give him the death penalty", could you keep an  
3 open mind to that and base your decision on the evidence  
4 as presented?

5 A Yes, sir. I think I could.

6 Q Assuming that he's found guilty of course?

7 A Yes, sir.

8 Q Okay. If the facts and the evidence presented  
9 to you, Mr. Wiltse, if the facts and evidence that you  
10 heard convinced you that the defendant needed to receive  
11 the death penalty could you do it?

12 A Yes, sir. I believe I could.

13 Q Okay. If the facts and evidence presented to  
14 you made you feel like that the defendant should receive  
15 a life sentence rather than a death penalty could you do  
16 that?

17 A Yes.

18 Q I will talk to you a little bit about murder  
19 in Texas and the law; murder in Texas, there are  
20 basically two types of murder, one is what I'm going to  
21 call "plain murder" or non-capital murder and that is  
22 where someone has intentionally caused -- intentionally  
23 or knowingly caused the death of an individual and that  
24 is to say they don't have any legal excuse like self  
25 defense or accident, they intentionally caused another



1 person's death or knowingly.

2 And in that situation the most  
3 punishment that person could receive is 99 years to life  
4 in the penitentiary. They cannot receive the death  
5 penalty.

6 There is another type murder in Texas  
7 where the death penalty is involved and that's capital  
8 murder and that's the murder where someone has  
9 intentionally caused another person's death, like in that  
10 first example I gave you, plus something else. And that  
11 plus something else is that the murder was a police  
12 officer or a fireman was murdered in the line of duty or  
13 the murder took place during the commission of a robbery  
14 or rape or kidnapping or an arson or something of that  
15 nature.

16 If you will, there is a sheet of paper  
17 up there marked "Exhibit 3." (Indicating)

18 THE COURT: To your right,  
19 next to it. Right there. (Indicating)

20 MR. TOWNSEND: That is a copy  
21 of the indictment in this case.

22 If you will just read it to yourself and  
23 I will talk to you about it some.

24 Okay. Mr. Wiltse, that is a copy of the  
25 indictment in this case and can you see from reading that

1 if the State were to prove all that to you that rather  
2 than being a plain non-capital murder that would be  
3 capital murder?

4 THE POTENTIAL JUROR: Yes,  
5 sir.

6 Q (BY MR. TOWNSEND) Because it alleges both  
7 murder and the robbery?

8 A Yes, sir.

9 Q The kind of juror we need in a capital murder  
10 case must be able to follow the law, you know, the law  
11 -- I don't guess any of us would probably agree with all  
12 the law but kind of like paying taxes, we might not agree  
13 with how much tax we have got to pay but we go ahead and  
14 do it anyway.

15 To sit on a jury you have got to be able  
16 to follow the law. And the Judge will set out the law  
17 for you and tell you what the law is, before you go  
18 deliberate you will have written instructions from the  
19 Judge that will tell you what the law is in this  
20 particular case or any other case you might be involved  
21 in as a juror.

22 In other words, to be a qualified juror  
23 you have got to be able to follow that law, you don't  
24 have to agree with it but as long as you can set aside  
25 your difference and do what the law tells you what to do

1 -- do you believe that you could do that?

2 A Yes, sir.

3 Q We are going to talk some more about different  
4 areas of the law and get your feelings on it but in a  
5 capital murder trial it takes place in two different  
6 parts, first there's a guilt or innocence phase in which  
7 the jury listens to the evidence and just determines "Is  
8 he guilty or not guilty, did he do it?"

9 And the second part, if the defendant  
10 is found guilty you go into what is called the  
11 "punishment phase" where you are going to hear more  
12 evidence but that evidence is going to relate to what the  
13 proper punishment should be.

14 And after you have heard that evidence  
15 you kind of consider that with all the other evidence you  
16 have heard and then decide whether the defendant should  
17 receive a life sentence or the death penalty.

18 There's a piece of paper up there that  
19 I call a "flow chart", looks kind of like this.  
20 (Indicating)

21 THE COURT: That's it.  
22 (Indicating)

23 MR. TOWNSEND: If you will  
24 look at that, I will go over that with you briefly.

25 You start -- this is kind of the way a

1 capital murder trial goes, we start at the top and the  
2 guilt or innocence phase, you are going to hear evidence  
3 about guilt or innocence of the defendant then after that  
4 is over the jury deliberates.

5 If the defendant is found not guilty the  
6 trial is over, everybody goes home.

7 If the jury finds the defendant guilty  
8 then you go to that next phase of the trial which is  
9 called the "punishment phase" there in the middle of the  
10 page there then you are going to hear more evidence.

11 Now, that evidence there rather than  
12 being about the guilt or innocence of the defendant, it  
13 won't cover that at all because you have already made  
14 that decision. That evidence is going to be about --  
15 will be the type of evidence that would hopefully help  
16 you decide what the appropriate sentence should be, the  
17 life sentence or death sentence.

18 It may be -- that evidence could be  
19 anything, it might be evidence from psychologists,  
20 evidence from the family members of the defendant,  
21 evidence that the defendant is alcoholic, is mentally  
22 retarded, has done prior criminal acts, has done prior  
23 acts of misconduct, any number of things.

24 But anyway those -- that evidence is  
25 designed to help you make your decision on punishment.

1                   Now, in making that decision on  
2                   punishment you don't have to throw that stuff away you  
3                   heard during the guilt or innocence, you know, you can  
4                   also consider that but in addition to considering that  
5                   you have to be able to listen to and consider that  
6                   evidence that you hear during the punishment hearing, no  
7                   matter what kind of evidence it is, you know, you can  
8                   listen and consider it and decide it's not important but  
9                   in order to be an open-minded fair juror you have got to  
10                  be able to listen to it, consider it and then kind of  
11                  weigh it all and decide what is important and what is not  
12                  important.

13                   Do you believe that you could do that?

14                   THE POTENTIAL JUROR: Yes.

15                  Q           (BY MR. TOWNSEND) Okay. After you have heard  
16                  all that evidence -- I think in the old days maybe the  
17                  jury just went back there and decided, "Well, you want  
18                  to give him a life sentence, raise your hand, if you want  
19                  to give him the death penalty, raise your hand", it's not  
20                  done that way in Texas anymore. It's done by answering  
21                  Special Issues or questions.

22                   After you have heard all this evidence  
23                   that I have talked about during the trial you are going  
24                   to go back there and vote in there, you are going to vote  
25                   on Special Issue #1, the question you answer "Yes" or

1 "No" -- and we'll go over that, what those questions are  
2 in a minute -- but for right now suffice it say you are  
3 going to answer Special Issue #1 "Yes" or "No."

4 If you answer that Special Issue #1 "No"  
5 the defendant will automatically receive a life sentence,  
6 if you answer that question "Yes" then you are going to  
7 go to Special Issue #2.

8 Special Issue #2, again is another "Yes"  
9 "No" question, if you answer that question "Yes" the  
10 defendant receives a life sentence, if you answer that  
11 question "No" the defendant receives the death penalty.

12 So basically what you are going to be  
13 doing, Mr. Wiltse, you are not going to be deciding  
14 whether he gets a life sentence or death penalty, you are  
15 just going to be answering those two questions "Yes" or  
16 "No" based on the evidence that you have heard.

17 Now, you are going to know, of course,  
18 because I just told you, what the results of those  
19 answers are, Number One is "Yes" and Number Two is "No"  
20 then he gets the death penalty, if they are answered any  
21 other way then he will receive a life sentence.

22 And those Special Issues, there is a  
23 sheet up there that is marked, says "Special Issues" on  
24 the top of it. (Indicating)

25 THE COURT: That's it.

1 (Indicating)

2 MR. TOWNSEND: If you will  
3 read just Special Issue #1 and we'll talk about it.

4 THE POTENTIAL JUROR: Okay.

5 Q (BY MR. TOWNSEND) Special Issue #1 is one  
6 thing I want to -- in proving our case to you on guilt  
7 or innocence the State has to prove that to you beyond  
8 a reasonable doubt and I think you are familiar with that  
9 Special Issue #1.

10 Also you read that first line there, we  
11 are required to prove that to you beyond a reasonable  
12 doubt, also then the second like is that word  
13 "probability" there and what that means is that first of  
14 all -- I'm sorry, I skipped over something -- Special  
15 Issue #1 basically is talking about I think the future  
16 dangerousness of the defendant, is that kind of what it  
17 looks like to you?

18 A Yes.

19 Q When you get to that word "probability", Texas  
20 law defines that as being "more likely than not" and  
21 "more likely than not" to put a numerical value on it,  
22 you might say just a little bit more than 50/50, is that  
23 kind of what "probability" means to you, "more likely  
24 than not", would that be close to your definition?

25 A Yes. I would say, you know, "The chances are

1 good."

2 Q We would have to prove to you beyond a  
3 reasonable doubt that it's more likely than not.

4 A Okay.

5 Q We are not required to predict to you or  
6 guarantee you or anything of that nature but just to  
7 prove to you beyond a reasonable doubt that it's more  
8 likely than not that he would commit some criminal act  
9 of violence in the future.

10 That word or the wording there toward  
11 the end of the second line, "criminal acts of violence",  
12 there are criminal acts of violence that are violent that  
13 are not capital murder such as assaults, rapes, attempted  
14 murders, things of that nature.

15 Now, we are not required to prove to you  
16 that the defendant would commit another capital murder,  
17 just that he would commit some other criminal act of  
18 violence.

19 On the other hand, there are criminal  
20 acts that are not violent such as forgery or theft or  
21 something like that and even though as a criminal act  
22 it's not a "criminal act of violence" so we are required  
23 to prove to you that it's likely that he would commit  
24 some criminal act of violence.

25 And then you read on down, "A criminal



1 act of violence that would constitute a continuing threat  
2 to society."

3 "Society" as the law defines it is not  
4 at your home or at work or wherever but it's just people  
5 -- it would include people on the street, it would  
6 include people in the penitentiary, it would include  
7 inmates in the pen, it would include nurses, doctors in  
8 the pen or anyone outside.

9 So we are not required to prove to you  
10 that he would be a threat to someone in a particular  
11 place, just that he would be a threat to society or  
12 threat to the people anywhere, you know, any particular  
13 place it might be.

14 Are you with me on that?

15 A Yes.

16 Q Okay. The important part about Special Issue  
17 #1 from the juror's standpoint is that in order to be a  
18 fair and impartial juror and follow the law once you have  
19 heard that evidence during the guilt or innocence you  
20 decide at that point whether the defendant is guilty not  
21 but you can't decide the answer to Special Issue #1 yet  
22 because you haven't heard that evidence during the  
23 punishment hearing.

24 So we have got to have the type jurors  
25 who can wait and not make their decision on Special Issue

1 #1 until they have had a chance to hear all that  
2 punishment hearing evidence.

3 Now, like I said, you can certainly go  
4 back and consider that guilt and innocence evidence when  
5 you are deciding Number One as long as you are willing  
6 to listen and consider that evidence that you heard from  
7 the punishment hearing also.

8 Could you do that?

9 A Yes.

10 Q Okay. If you will read over Special Issue #2  
11 and then I will talk to you about that.

12 A Okay.

13 Q Okay. Mr. Wiltse, Number Two is a lot of legal  
14 wording there and what it all boils down to is you have  
15 found the defendant guilty of capital murder, you have  
16 decided that he's a threat to society because if you  
17 voted "No" on that you wouldn't be considering Number  
18 Two.

19 A Right.

20 Q He would have already automatically received  
21 the life sentence but since you are considering Number  
22 Two you have already decided that he's already a threat  
23 to society.

24 One thing about Number Two that is  
25 different, we are not required to prove that to you

1       beyond a reasonable doubt, that is just kind of your  
2       opinion on Number Two.

3               And what it is; you have looked at the  
4       case and you are saying or they are asking you, is there  
5       anything about this case that makes you feel like this  
6       defendant should receive a life sentence rather than the  
7       death penalty, is there something in this evidence that  
8       is sufficiently mitigating to you whether it's one thing  
9       or a combination of things, whether the evidence came  
10      from this side of the table or that side of the table but  
11      is there just anything or something in this case that is  
12      sufficient in your mind?

13              And if you will notice the term  
14      "sufficient" -- "mitigating."

15              Mitigating evidence is the evidence that  
16      reduces the defendant's moral blameworthiness, down there  
17      at the very bottom, so is there something in this case  
18      that sufficiently reduces his blame in your mind to the  
19      point sufficiently enough or to the point that you  
20      believe the defendant should receive a life sentence  
21      rather than the death penalty.

22              If you answer "No" to that then you are  
23      saying, "No. There is nothing in there that sufficiently  
24      reduces his blame to me so I think he should get the  
25      death penalty."

1                   If your answer is "Yes" then you are  
2                   saying, "Yes, there is something in there that I think  
3                   should reduce his blame enough to give him a life  
4                   sentence."

5                   That evidence that you hear during the  
6                   punishment hearing or during the trial, different people  
7                   look at it different ways, you know, some people might  
8                   think that a defendant -- and, Mr. Wiltse, keep in mind  
9                   I am not necessarily talking to you -- as a matter of  
10                  fact I'm not talking to you about this case, I'm just  
11                  talking to you about capital murder cases in general so,  
12                  you know, in a capital murder case you might hear  
13                  evidence that the defendant was mentally retarded, if you  
14                  heard evidence like that it might or might not, depending  
15                  on your point of view make you feel as if that reduced  
16                  his blame enough that he should receive a life sentence.

17                  You might hear evidence of some  
18                  psychologist or you might hear evidence that they had had  
19                  a defendant that had a rough upbringing, had kind of a  
20                  rough family life, you might hear all sorts of evidence  
21                  but the important thing about that evidence and the  
22                  important thing from a juror's standpoint in order to be  
23                  a qualified juror you have got to be able to keep an open  
24                  mind as to any of that evidence that you hear.

25                  And when I say "Keep an open mind", what

1 I mean, you have got to be able to listen to it and  
2 consider it all and then make your decision.

3 For instance, some people distrust or  
4 don't believe that psychologists know what they are  
5 talking about. We have got to have jurors who don't  
6 necessarily think psychologists are great but we have  
7 got to have jurors who are at least willing to listen to  
8 them, consider what they have to say and then determine  
9 whether that's important or not and not just say, "That  
10 psychologist, I'm not going to listen to him."

11 Would you be able to keep an open mind  
12 and listen to all the evidence?

13 A Yes, sir.

14 Q And consider it and then make your decision?

15 A Yes.

16 Q And that would be whether it was as to family  
17 history, could you listen and consider family history  
18 the same way?

19 A Yes, sir.

20 Q Retardation the same?

21 A Yes.

22 Q Could you listen to the evidence that did --  
23 that indicated that the defendant had a drug problem, for  
24 instance, could you listen and consider that?

25 A Yes, sir.

1 Q Could you listen and consider evidence as to  
2 the age of the defendant?

3 A Yes, sir.

4 Q Okay. Those are just examples, you know, I  
5 couldn't even think of all the possible situations but  
6 those are examples of things that you might hear and if  
7 there was any other type evidence that was presented  
8 would you listen to it and consider it before making your  
9 decision?

10 A Yes.

11 Q Mr. Wiltse, that's not to say that you are  
12 going to give weight to that evidence, you must listen  
13 to it, consider it and decide, "Well, that's just not  
14 important" or you might think it was very important. And  
15 we are not asking you -- I'm not and I know the Defense  
16 Attorney wouldn't be asking you, you know, we are not  
17 trying to pin you down and get you to say that you will  
18 give weight to any particular piece of evidence, just  
19 simply that you would be willing to listen to it and  
20 consider it.

21 Could you do that?

22 A Yes, sir.

23 Q Okay. And the answers on Special Issue #1 and  
24 Issue #2, the death penalty -- excuse me -- capital  
25 murder cases in Texas; if the defendant is found guilty

1 and received a life sentence he will go to the  
2 penitentiary for 35 years before becoming eligible for  
3 parole.

4 That doesn't mean he will be paroled in  
5 35 years but he would be eligible for parole at that time  
6 which means he could get parole in 35 years or 40 years  
7 or 45 years or he might never get parole.

8 A Yes.

9 Q But the important thing from a juror's  
10 standpoint -- I believe the Judge will instruct you  
11 before you go back and make your decision on Special  
12 Issue #1 and Issue #2, instruct you in the law something  
13 like this and that is to say that basically the Judge is  
14 going to put in these instructions that you cannot  
15 consider parole for any purpose in determining your  
16 answers to Special Issue #1 or Issue #2, you are -- that  
17 is to say you are just supposed to consider a life  
18 sentence as a life sentence and death penalty as the  
19 death penalty and, after all, your answers to Special  
20 Issue Numbers 1 and 2, those are "Yes" or "No" questions,  
21 you know, you are supposed to be fair-minded and answer  
22 those questions based on the evidence and not consider  
23 parole in any way.

24 Could you do that?

25 A Yes.

1 Q When I say "Answer those questions based on the  
2 evidence" basically what I'm saying you need to do is  
3 just go ahead, answer those questions as the evidence  
4 dictates that those answers should be, whether it be  
5 "Yes" or "No" and just basically let the chips fall where  
6 they may and not answer, not in any way say, "Well, I  
7 want this guy to get a life sentence so I'm going to say  
8 'Yes' and 'No' on these" or I'm going to say "No and 'No'  
9 on these questions or whatever" or "I want the guy to get  
10 the death penalty so I'm going to make sure and answer  
11 these questions 'Yes' and 'No'."

12 We have got to have jurors that can  
13 answer those questions as they should be answered based  
14 on what you believe about the evidence and how you would  
15 interpret that evidence.

16 Could you do that?

17 A Yes.

18 Q When I say that I mean we have got to have  
19 jurors who are not biased toward a life sentence or  
20 biased toward the death penalty or don't have a prejudice  
21 one way or another.

22 And I believe in your questionnaire I  
23 believe you indicated that you could give the death  
24 penalty on -- in murder cases if you felt like it was  
25 appropriate and you also answered that you could give a



1 life sentence if you felt like that was appropriate.

2 I don't know if you remember your answer  
3 on that or not.

4 A That sounds right.

5 Q That's basically what you said.

6 A Yes.

7 Q You also said that "I believe that the  
8 punishment for a crime should be equal to the crime  
9 committed."

10 Having said that are you saying that you  
11 believe that after you have heard all the evidence then  
12 you would note what you feel the appropriate punishment  
13 would be?

14 A Yes. I think so.

15 Q You are not saying --

16 A I'm not necessarily --

17 Q -- you are not saying "An eye for an eye,  
18 anytime there's a murder there would have to be a death  
19 penalty?"

20 A No. I think there are probably circumstances  
21 that would surround it that would change that.

22 Q And that's basically what a fair juror does,  
23 that he waits and weighs all that evidence before making  
24 their decision.

25 Okay. You don't have any bias or

1 prejudice toward the death penalty or toward a life  
2 sentence, you could give each one a fair opportunity  
3 and --

4 A I think I could. Yes.

5 Q Just as quickly give a defendant a life  
6 sentence or the death penalty, depending on what you felt  
7 was appropriate?

8 A Yes, sir. I believe I could be fair in  
9 something, you know, as the evidence was presented to me  
10 I could take it and weigh it and decide fairly. I hope.

11 Q Okay. Let me kind of shift gears a little bit  
12 and talk to you about some general areas of the law that  
13 relate to death penalty cases but also relate to most  
14 any criminal case; murder in Texas is what -- just plain  
15 murder, not capital murder what we talked about earlier  
16 and that's punishable by from five years probation up  
17 through 99 years or life in the penitentiary and that's  
18 sort of recognizing that murder is a lot of different  
19 things to a lot of different people and a lot of  
20 different situations involved that are called "murder."

21 A murder can be just anything from a  
22 very vicious type crime to mercy killing type situation  
23 where you have elderly people living together and one of  
24 them has cancer and is dying slowly and in such a great  
25 deal of pain and begs the other person to pull the plug

1 for them.

2 And when that person pulls the plug they  
3 have done what we call in Texas "intentionally caused the  
4 death of another individual."

5 So even though it is not what you and  
6 I normally think of when we think of murder that is  
7 technically a murder.

8 A Yes.

9 Q So when you have got that full range of  
10 punishment if you are a juror on a murder case -- and we  
11 are not asking you again to say you would give five years  
12 probation or you would give 99 years to life because you  
13 don't know what the situation might be but just what I'm  
14 asking you, in order to be a fair juror you have got to  
15 be able to keep an open mind to what the proper  
16 punishment would be and you have got to consider that  
17 full range of punishment, whether it was 99 years to life  
18 or five years probation or anywhere in between.

19 Could you consider that full range of  
20 punishment?

21 A Yes, sir. I could.

22 Q Let's say we had a capital murder case and  
23 involved an allegation in the indictment of murder and  
24 robbery and that's the reason it's called capital murder,  
25 because there's murder and robbery.

1                   And the State went in and proved to you  
2                   beyond a reasonable doubt that the defendant committed  
3                   the murder but we didn't quite prove to you that he  
4                   committed the robbery.

5                   In following your oath as a juror you  
6                   would have to find that defendant not guilty of capital  
7                   murder because we failed to prove the robbery to you but  
8                   find him guilty of the offense of murder, "murder" not  
9                   "capital murder?"

10           A           Yes.

11           Q           Could you do that if the evidence was a little  
12                   bit weak on the robbery and we didn't quite prove it to  
13                   you?

14           A           Yes. I could.

15           Q           Okay. Because after all that indictment there  
16                   -- well, let's take for instance this case, the  
17                   indictment says murder and robbery, that's what we have  
18                   got to prove to you, what we have got in the indictment.

19                   If we prove capital murder some other  
20                   way, say the indictment says murder and robbery yet we  
21                   didn't prove murder and robbery, we proved murder and  
22                   rape, again, we didn't prove what we said in the  
23                   indictment.

24           A           Yes.

25           Q           So you would have to find him not guilty of

1 capital murder but still guilty of murder.

2 Could you do that if that were the case?

3 A Yes, sir.

4 Q It would be a pretty strange scenario for us  
5 to allege one thing and prove another but a lot of things  
6 we talk about are kind of unusual circumstances but we  
7 are just trying to cover as much ground as we can.

8 Another thing about murder cases is that  
9 in a capital murder case we have to prove that the murder  
10 was done intentionally and that is to say if the  
11 defendant's conscious objective and desire was to commit  
12 that murder, that's what he wanted to do, that's what he  
13 intended to do but in a regular murder case, a "plain  
14 murder" case, is what I call it, we can prove that he  
15 intentionally did it or prove that he knowingly did it  
16 which basically means that he didn't necessarily intend  
17 it but he knew that it was likely to happen.

18 A Yes.

19 Q If we proved to you the robbery and proved to  
20 you the murder but didn't prove that he did it  
21 intentionally, only proved that he did it knowingly,  
22 again, your duty as a juror would be to find him not  
23 guilty of capital murder but guilty of murder because we  
24 didn't prove the intentional part.

25 Could you do that?

1 A Yes, sir.

2 Q Okay.

3 THE COURT: Thirty minutes.

4 MR. TOWNSEND: Thank you, Your  
5 Honor.

6 We are required to prove these things  
7 to you beyond a reasonable doubt. Of course that's not  
8 beyond all doubt but along with proving it beyond a  
9 reasonable doubt this is what we call the burden of  
10 proof, the burden of proof in this case rests strictly  
11 with the State of Texas.

12 The defendant, on the other hand, they  
13 have no burden of proof. They don't have to prove  
14 anything, they could sit there -- and I'm sure they won't  
15 -- but they could sit there and not do a dad gum thing,  
16 okay, now, and that wouldn't shift the burden of proof  
17 because the burden of proof never shifts, it stays right  
18 here.

19 We accept that, we knew it going in,  
20 it's always been that way, we wouldn't be here if we  
21 weren't ready to accept that burden.

22 Is that a burden that you are familiar  
23 with that burden of proof and could you hold us to our  
24 burden of proof and not make them prove his innocence,  
25 so to speak?

1 A Yes, sir.

2 Q Okay. Along with that burden of proof goes the  
3 Fifth Amendment privilege and that basically says that  
4 the defendant has the right to -- not to testify if he  
5 so chooses.

6 The important thing about that from a  
7 juror's standpoint is that in order to be a qualified  
8 juror you have got to be able to base your decision on  
9 the evidence and not hold it against the defendant in any  
10 way.

11 If he chose not to testify could you do  
12 that?

13 A Yes.

14 Q Okay. And that goes not only to the guilt and  
15 innocence phase but it also goes to the punishment phase.

16 In the punishment phase, you know, it  
17 may be human nature for you to want to hear what the  
18 defendant has got to say or it may be human nature, "I  
19 would just like him to, if he's guilty, to say his  
20 story", but the Fifth Amendment privilege says the  
21 defendant has the right not to testify and there may be  
22 a lot of different possible reasons why the defendant  
23 might not make that choice but anyway the important part  
24 from the juror's standpoint that you understand that you  
25 can't hold that against him at the punishment hearing.

1 You can't on Special Issue #1 and Issue #2, you can't  
2 base your decision in any way on the fact that he didn't  
3 testify.

4 Could you do that?

5 A Yes, sir.

6 Q Okay. In criminal cases you hear testimony  
7 from all sorts of witnesses, some of those witnesses  
8 might be ministers, psychologists, someone that worked  
9 at the Dairy Queen, a police officer, you know, all sorts  
10 of different types of witnesses.

11 The important part for the jury is that  
12 they be able to start each witness out and give each  
13 witness a fair shake and not start one witness out ahead  
14 of the other one by saying, "Well, that guy is a  
15 policeman, I'm going to really pay a little more  
16 attention to him" or "I'm going to start him out a little  
17 bit ahead of everybody else."

18 You know, certainly we want you to  
19 listen to the witnesses, we want you to make a  
20 determination in your own mind as to whether or not those  
21 witnesses' testimony has been truthful, whether it's been  
22 important, that sort of thing.

23 So we have got to have jurors who would  
24 -- can start each witness out at the same place on the  
25 track, so to speak, not give any witness an advantage



1 just because of his profession or just because he might  
2 be someone that, you know, I don't think it's likely that  
3 you would know any of the witnesses in this case but if  
4 you did you would need to be able to give them the same  
5 opportunity that you gave anyone else, listen to their  
6 testimony and then decide what you think about their  
7 evidence and what you think about their testimony.

8 Could you do that?

9 A Yes, sir.

10 Q Even if that witness was a police officer, even  
11 if that witness was a minister?

12 A Yes.

13 Q The defendant's mother?

14 A Yes.

15 Q Whoever it might be?

16 A Yeah.

17 Q Okay. In criminal trials oftentimes you hear  
18 or you are presented evidence of a defendant making a  
19 confession. That confession might be in writing or it  
20 might be just an oral confession, either way.

21 I believe if you heard such a confession  
22 in a criminal trial the Judge would instruct you that in  
23 order for you to consider that confession as evidence you  
24 would have to decide and determine beyond a reasonable  
25 doubt that evidence -- excuse me -- "that confession" was

1 both voluntary and truthful.

2 And when I say "voluntary" the obvious  
3 situation is if you believe that the defendant gave the  
4 confession but he was beat up, too, you know, and forced  
5 to give it of course that would be involuntary and the  
6 law requires that you not consider that confession in any  
7 way if that's the case

8 Could you do that?

9 A Yes, sir.

10 Q And there's another voluntariness issue; under  
11 the law a confession, depending on circumstance of a  
12 confession but certain -- at certain times confessions  
13 would not be considered legally voluntary, if the  
14 defendant has had -- not had his Miranda Rights read to  
15 him -- do you know what I'm talking about when I say  
16 "Miranda Rights?"

17 A Yes, sir.

18 Q The right to remain silent and so on?

19 A Yes.

20 Q In certain situations a confession wouldn't be  
21 considered legally voluntary unless those rights were  
22 read to him completely, just say find, that you have been  
23 presented evidence of a confession, you have decided that  
24 we have proven to you beyond a reasonable doubt that that  
25 confession is truthful but we haven't proven to you that

1 it was voluntary because you don't believe that the  
2 defendant was read his Miranda Rights or wasn't read --  
3 that they left the part of it, read it but they left  
4 about half of it out.

5 Your duty as a juror in following your  
6 oath would be to follow the law. In following the law  
7 you would have to be able to set that aside.

8 I mean, we can't ask you to put that out  
9 of your mind --

10 A Yes.

11 Q -- because it's there.

12 But you would have to be able to set  
13 that aside and in determining the guilt or innocence of  
14 the defendant you would have to be able to determine that  
15 without considering that confession that you heard in any  
16 way.

17 Could you do that?

18 A Yes, sir.

19 Q The same thing holds true for the punishment  
20 phase; if the defendant somehow or another in that  
21 confession that you believe to be truthful even though  
22 it wasn't voluntary, the defendant said something about  
23 an act that he committed that was very gruesome or  
24 brutal, when you are deciding your answer to Special  
25 Issue #1 and Issue #2 you cannot consider that confession

1 in any way in making those decisions. You would have to,  
2 you know, again mentally set it aside.

3 Could you do that?

4 A Yes.

5 Q Okay. The same question; if you have a couple  
6 of different witnesses that testified during the trial  
7 and their testimony is in conflict but yet one of those  
8 witnesses' testimony kind of goes along with what the  
9 confession said, you have got to decide the credibility  
10 of those witnesses without saying, "Well, you know, what  
11 she said kind of went along with the confession so I'm  
12 going to believe her."

13 You have got to consider their  
14 credibility some other way without considering the  
15 confession.

16 Could you do that?

17 A Yes, sir.

18 Q You have looked at the copy of the indictment  
19 in this case, Mr. Wiltse, I think from talking to the  
20 Judge back in October he explained to you that an  
21 indictment is not evidence of any kind in this case or  
22 any criminal case.

23 A Yes, sir.

24 Q And you cannot consider it in any way in  
25 determining whether the defendant is guilty or not

1 guilty.

2 Would you be able to set that indictment  
3 aside and not consider it so far as determining guilt or  
4 innocence?

5 A Yes, sir.

6 Q Okay. After looking at your questionnaire, Mr.  
7 Wiltse, I had a few questions and it may have been so  
8 long ago you -- since you filled this out you may not  
9 even remember what you put on there.

10 THE COURT: There it is if you  
11 need it. (Indicating)

12 MR. TOWNSEND: There is a  
13 question there that refers on Page 9, about the middle  
14 of Page 9 and it talks about if you or your spouse or any  
15 family member have ever been charged with crimes,  
16 basically. (Indicating)

17 THE POTENTIAL JUROR: Yes,  
18 sir.

19 Q (BY MR. TOWNSEND) Above the level of traffic  
20 tickets.

21 You said "Yes" and said "Marijuana."

22 Was that you or some other family  
23 member?

24 A It was actually me. It was a misdemeanor  
25 charge.

1 Q It was a misdemeanor?

2 A Yes, sir.

3 Q How long ago was that?

4 A It would have been December of '78.

5 Q It has been awhile then?

6 A Yes, sir.

7 When I was a senior in high school, got  
8 caught with a couple of other boys and was in their  
9 vehicle and it was found in the vehicle.

10 Q Was that here or somewhere else?

11 A It was here in Titus County.

12 Q Here? Okay.

13 Is that the only arrest that you have?

14 A Yes, sir.

15 Q Other than traffic tickets?

16 A Other than a traffic ticket.

17 Q Okay. Was there anything about that arrest or  
18 anything about the disposition of that case that -- did  
19 you feel like you were treated fairly?

20 A I spent the night in jail and I went home and  
21 paid my fine and that was it.

22 I was caught for something that was done  
23 wrong and, yeah, I felt like I was -- that I was dealt  
24 with fairly.

25 I do now, maybe at the time I didn't but

1 I do now.

2 Q Well, our opinions change a little as we get  
3 older, don't they?

4 You indicated on your questionnaire also  
5 over on Page 11 you indicated that you knew something  
6 about the facts or the purported facts of the case; is  
7 that information that you have, is that through the  
8 newspaper or to you?

9 A Yes, sir. Newspaper and hearsay, I mean.

10 Q Have you heard people talk about the case?

11 A Yes, sir.

12 Q Okay. What is it that you -- what have you  
13 heard?

14 A Just basically that this person, you know, was  
15 killed and his truck was stole, it was recovered in  
16 another state.

17 That's about really all I know about it.

18 Q Is that about the sum total of what you know?

19 A Yes, sir.

20 Q Okay. Of course I think you know from what we  
21 have talked about so far that you can't base your  
22 decision on anything but the evidence that you heard in  
23 the courtroom?

24 A Yes.

25 Q And of course anything you heard out on the

1 street or anything you may have read in the newspaper or  
2 seen on TV, that's not evidence and I think you  
3 understand that?

4 A Yes, sir.

5 Q Would you be able to sit on the jury and make  
6 the decision you need to make without giving any  
7 consideration whatsoever to what you heard in the  
8 newspaper or heard on the street or anything of that  
9 nature?

10 A Yes, sir. I could.

11 Q Okay. Mr. Wiltse, we all say things like, we  
12 say like "We think we could" and "I don't know if I could  
13 do that."

14 Really what I need and what we need to  
15 hear from you is either you can do it or you can't.

16 I don't mean to be --

17 A Yeah. Okay. Yes. I could.

18 Q You could do that?

19 A Yes.

20 Q I think that's what you meant anyway?

21 A Yes.

22 Q But that's just a phrase we all use.

23 Okay. Mr. Wiltse, one of the attorneys  
24 in this case is Mr. Bird Old, do you know him?

25 A No, sir.



1 I have seen him around town. I don't  
2 know him.

3 Q Nothing about that situation that would cause  
4 you to lean toward the State or against the State?

5 A No.

6 Q The other Defense Attorney is Lance Hinson.

7 Do you know Lance?

8 A No, sir. Never seen him before until earlier  
9 -- the time we met before.

10 Q Okay. Do you know the Defendant, I mean the  
11 Defendant in this case, Mr. Wardlow, do you know anything  
12 about him or any of his family?

13 A No, sir.

14 Q The victim in the case was Carl Cole, do you  
15 know anything about Mr. Cole?

16 A I know a nephew of his, that's the only thing.  
17 I know Mr. John Edwards that is a nephew of his.

18 Q Okay.

19 A I didn't know he was even a nephew of his until  
20 after the murder had took place and realized that it was  
21 his uncle that had been killed.

22 Q Have you discussed this case with John Edwards?

23 A No, sir.

24 Q Is there anything about -- to your knowledge  
25 of Mr. Edwards that would cause you to lean toward the

1 State or lean toward the Defendant?

2 Could you be fair and impartial, the  
3 fact that you know Mr. Edwards?

4 A Yes, sir. I believe I can.

5 Q It wouldn't make any difference?

6 A No. It would not.

7 Q Mr. Wiltse, I spent a lot of time asking you  
8 questions and I haven't given you an opportunity to ask  
9 questions; do you have any questions about the law or  
10 that you would like to ask me?

11 A No.

12 Q Is there anything that you feel, anything that  
13 we need to know that I just forgot to ask that might be  
14 important and have a bearing on your jury service?

15 A No. I feel like, you know, I can be fair and  
16 impartial and do the best I can if I am chosen.

17 MR. TOWNSEND: Okay.

18 Your Honor, I'll pass the juror.

19 THE COURT: Let's take about  
20 a five minute break.

21 We will start back at 2:00 o'clock.

22 You may step down, sir, we will bring  
23 you back out in about five or six minutes.

24

25 (Recess.)

1 (The following occurred in the presence  
2 and hearing of the potential juror:)

3  
4 THE COURT: Is the Defense  
5 ready to proceed?

6 MR. OLD: They are, Your  
7 Honor.

8 THE COURT: Proceed.

9  
10 VOIR DIRE EXAMINATION

11 BY MR. OLD

12  
13 Q Mr. Wiltse, I have been introduced to you, I  
14 am Bird Old, I represent Mr. Wardlow.

15 The way I like to start this off; what  
16 we are trying to do is determine whether or not you  
17 qualify in this case to be a juror. The one necessary  
18 ingredient for you to move from the seat that you are in  
19 to one of those over there is when you get over there you  
20 take an oath, you take an oath to tell the truth. And  
21 I believe you are telling us the truth, I'm not  
22 questioning you on that but the oath is a little  
23 different to become a juror.

24 And what that oath asks you to affirm  
25 or swear to is that "In the case that you are going to

1 try you will a true verdict render according to the law  
2 and the evidence so help you God."

3 Now, according to the law a juror might  
4 say, "I can't do that, I don't know what all the law is.  
5 I'm not a lawyer, I am not a judge."

6 That is not what you are required to do.

7 His Honor through your written  
8 instructions at the end of the evidence, he will instruct  
9 you in writing on what the law for you to use in this  
10 case is.

11 Then your duty is to determine on the  
12 evidence that is before you.

13 A Yes.

14 Q Okay. And what we are -- the questions we are  
15 asking, and I'm probably going to ask you about the  
16 same things that Mr. Townsend did, I'm trying to hear  
17 your views on things and I want to hear your views, I  
18 want -- I don't want to do all the talking, I want you  
19 to talk to me. I'm not trying to embarrass you and I'm  
20 not trying to take issue with you, I'm not picking on  
21 you, I'm not trying to get rid of you, I'm just trying  
22 to find out enough about you and about your views to make  
23 a decision on.

24 A Okay.

25 Q Let's go to the first page of your

1 questionnaire; you said you were in favor of the death  
2 penalty in some cases and you could also assess life in  
3 some cases?

4 A Yes.

5 Q Okay. In your written explanation you said  
6 that you believe the punishment for a crime should be  
7 equal to the crime committed?

8 A Yes, sir.

9 Q And I mean I see those -- that is inconsistent  
10 with your other two answers, I'm not trying to put words  
11 in your mouth and imply that you said something that you  
12 didn't say, I think that written statement, that says to  
13 me that "If you kill someone or murder someone then you  
14 ought to be killed", isn't that pretty well your view?

15 A I didn't read it that way.

16 Q Okay.

17 A Personally I felt like, you know, in certain  
18 situations, certain -- like this issue said, there are  
19 mitigating evidence that might cause a person to commit  
20 a crime and be guilty of a murder but not necessarily be  
21 guilty to or deserving of the death penalty in that case.

22 But then I believe there are some cases  
23 and, you know, I think that's part of what you have got  
24 to find out, if those circumstances equal up to more than  
25 the death penalty or not.

1 Q Okay. I think so.

2 The indictment you have read uses the  
3 word "intentional."

4 "Intentional" -- let me -- in the law  
5 the Court gives you he will define words to you and one  
6 of those words defined will be the word "intentionally",  
7 it will tell you what "intentionally" means according to  
8 the law.

9 A All right.

10 Q And what your oath says, whether you think  
11 "intentionally" means something else or not you have got  
12 to take what the law says about "intentionally" and use  
13 that as a standard.

14 A Yes.

15 Q I suspect if you and I sat down and both wrote  
16 out a definition of the word "intentionally" we might  
17 come close to each other but it would be different.

18 And what the law will tell you, the  
19 Court will tell you as to the word "intentionally; a  
20 person acts intentionally or with intent with respect to  
21 the result of his conduct when it is his conscious  
22 objective or desire to cause the result."

23 Okay. So you have to find it was a  
24 person's conscious objective or desire to kill someone  
25 that you find "intentional."

1 A Yes. Okay.

2 Q Okay. Is there anything offensive to you about  
3 that definition?

4 A No, sir.

5 Q Okay. Let me give you a comparison; I believe  
6 Mr. Townsend mentioned to you that what he called "non-  
7 capital murder" or "plain murder", that a person was  
8 guilty of it if he intentionally or knowingly took the  
9 life of another.

10 "Knowingly" is another one of those  
11 words that has legal meaning and what it says is "A  
12 person acts knowingly or with intent with respect to the  
13 result of his conduct when he is aware that his conduct  
14 is reasonably certain to cause the result."

15 Do you see a difference between --  
16 between "intentionally" and "knowingly?"

17 A Not really.

18 Q Let me -- we said "intentionally" was someone's  
19 conscious objective or desire -- or desire to cause the  
20 result?

21 A All right.

22 Q As to "intentionally", we said that "with  
23 respect to a result of his conduct, when he is aware that  
24 his conduct is reasonably certain to cause the result?"

25 A Yes. I am -- I always, you know, to me if a

1 person is intentionally going to do something he  
2 knowingly does it.

3 Q Okay. You are saying they mean the same thing  
4 to you?

5 A Yes, sir.

6 Q Do you see the law making a distinction between  
7 "intentionally" and "knowingly", what I have read to you?

8 A I guess they do but I don't know that I see it,  
9 I mean.

10 Q I am not -- do you want me to repeat those  
11 definitions for you or either one?

12 A Yes. Go ahead and read them again.

13 Q Is "knowingly" the one that you are having a  
14 problem with? I --

15 A Read them both again, that would be fine.

16 Q I'm going to read "knowingly" first; "A person  
17 acts knowingly or with knowledge with respect to a result  
18 of his conduct when he is aware that his conduct is  
19 reasonably certain to cause the result."

20 A Okay.

21 Q "Intentionally; a person acts intentionally or  
22 with intent with respect to a result of his conduct when  
23 it is his conscious objective or desire to cause the  
24 result."

25 A Okay. I see what they are saying the



1 difference is. Yes.

2 Q So could you, now, I mean your -- the oath that  
3 you will take as a juror requires you to keep those two  
4 definitions and to apply those two definitions to the  
5 evidence.

6 Are you going to have a problem doing  
7 that?

8 A I don't think so. No, sir.

9 Q Now, the indictment that you were reading --  
10 that you have read, it says "intentionally" and does not  
11 say "knowingly", that is what is required of the State  
12 to prove, that's the written charge in this case, it says  
13 he must intentionally prove he caused the death during  
14 the course of a robbery.

15 A Right.

16 Q If it was proven to you and the -- if the  
17 evidence only sustained to you the result that a person  
18 knowingly caused the death during the course of a robbery  
19 would you find him not guilty of capital murder?

20 A According to what you just read the law says.  
21 Yeah. You would have to.

22 Q Now, I think you would have to, too. Can you  
23 do that if that's what the evidence is?

24 A Yes. If that's what the evidence indicates.

25 Q Do you -- and I mean if you can follow the law

1           whether you agree with it or not?

2           A           Yes.

3           Q           That's not a problem?

4                       Do you -- first, do you disagree with  
5           that being the law?

6           A           No, sir. I don't think so.

7           Q           There is an exhibit before you numbered "6" and  
8           in its second paragraph at the bottom of the page it is  
9           what the Court will instruct you as to the meaning of  
10          "beyond a reasonable doubt."

11                      Can I get you to read that and consider  
12          it and when you are comfortable will you tell me?

13          A           Okay.

14          Q           Again, if you and I both had written down,  
15          wrote our definitions of reasonable doubt and I didn't  
16          already know this, that's not what we would have written  
17          down.

18                      Did you read from the second paragraph  
19          to the bottom of the page?

20          A           "To the bottom of the page?"

21                      I thought you said "the second  
22          paragraph."

23          Q           Okay. Is your own definition of reasonable  
24          doubt different in meaning from what it says there?

25          A           Well, "reasonable doubt" to me means you have

1 no -- you know, I don't know if I would word it just like  
2 that but to me "reasonable doubt" means "That you believe  
3 wholeheartedly that what you were presented was the  
4 truth."

5 Q Okay.

6 A Is how I would put it.

7 Q What has been presented to you or what you have  
8 decided from what has been presented to you?

9 A Yes, sir.

10 Q You work down at the Cason Power Plant for  
11 Southwestern?

12 A Yes, sir.

13 Q In what you have heard about the incident  
14 giving rise to this charge, did you hear that it happened  
15 it or near Cason, Texas?

16 A Yes, sir.

17 Q As the crow flies Cason is what, mile, mile and  
18 a half from the Power Plant, two miles?

19 A Yeah. Two miles, probably six miles by the  
20 road.

21 Q Did you hear this talked at work?

22 A Yes.

23 Q Was that near in time to the event that was  
24 being reported?

25 A Yes, sir.

1 Q Okay. You also said that you knew John Edwards  
2 and he was a nephew of Mr. Cole?

3 A Yes.

4 Q Is that "John Edwards the plumber?"

5 A Yes, sir.

6 Q Does he have two sons?

7 A Michael and David.

8 Q About your age?

9 A Yes.

10 Q Did you all grow up together?

11 A I didn't move to Mount Pleasant until I was a  
12 junior in high school and they were both a couple of  
13 years younger than me. I didn't know them until I was  
14 more or less out of school.

15 We didn't grow up together.

16 Q Are you all friends now?

17 A Yes, sir.

18 Q I mean you all socialize together?

19 A Go to church with them.

20 Q Where do you go to church?

21 A Calvary Baptist Church here in Mount Pleasant.

22 Q Is Mike's father-in-law the minister at  
23 Calvary?

24 A No.

25 Q Not trying to put words in your mouth but would

1           you consider them to be close friends?

2           A           No, sir. Not really "close friends", just good  
3 acquaintances, go to church with them.

4           Q           You are well acquainted with them?

5           A           Yes, sir.

6           Q           You all participate in church activities  
7 together?

8           A           Yes, sir.

9           Q           Been to each other's homes?

10          A           Yes, sir.

11          Q           Your wives pass back and forth?

12          A           Not really. Just basically our social life  
13 revolves around the church more or less.

14          Q           Have they commented on this event?

15          A           No, sir. Not -- as far as I know they are not  
16 aware that I was even selected for the jury duty.

17          Q           No. I don't mean that but I mean in talking  
18 to them?

19          A           No, sir. As far as I know I have never -- I  
20 can't remember them ever mentioning it.

21          Q           How did you come to know that Mr. Cole was John  
22 Edwards' uncle?

23          A           Well, at the time Mr. John and David weren't  
24 even going to our church. I knew them, I had gone to  
25 church with them at another church previously and they

1 weren't going to church here but, you know, it was just  
2 mentioned that John had lost an uncle and we needed to  
3 remember the family and, you know, the circumstances  
4 evolving, you know, the loss of his uncle were discussed  
5 and that's how I knew who it was.

6 Q Would your relationship with the Edwards in  
7 deliberating and deciding this case if you are a juror  
8 might could or would that relationship with them effect  
9 you as a juror?

10 Would it effect your verdict is what I'm  
11 asking? Could it effect your verdict?

12 A No, sir. I don't think it would. I would not  
13 let it. No.

14 Q What I'm really asking you, I know that you  
15 would do your best to guard against it but back here in  
16 the back of your mind in that subjective analysis that  
17 we do, that is going to be in there, isn't it?

18 A Yes. I am sure it is.

19 Q I mean I can't make you -- I can't take it out  
20 of your mind and have you on there not knowing, I can't  
21 put you in that test tube but do you think that is going  
22 to gnaw on you and come back to you as a juror that "This  
23 man is related to someone who is close to me" to some  
24 degree?

25 A I am sure it's going to be back there in the

1 back of my mind but I don't think I will let that become  
2 a factor in my decision if I have to make a decision in  
3 a case.

4 Q I'm going to be like Mr. Townsend, "I don't  
5 think" isn't good enough.

6 A No, sir. It won't.

7 Q I am taking you at your word that that is not  
8 going to effect your deliberation.

9 A Yes, sir.

10 Q There is a Witness List in front of you that  
11 is entitled at the top, is typed "Witness List", can I  
12 get you to go over that and look at all the names on it  
13 and the first one you come to, if any of them are names  
14 that you know -- I'm not talking about somebody you  
15 personally know but somebody you have heard of, even had  
16 a casual relationship with onto a close relationship tell  
17 me, please.

18 A I knew a guy named -- it's "James Franklin  
19 Ragsdale" here but he lived in Cason, I worked with him  
20 for a period of time there at the Power Plant but --

21 Q I think "Route 4, Pittsburg", may even be the  
22 Power Plant, I think that's that area?

23 A Yes, sir. It is.

24 Q All right.

25 A He no longer -- what was his name -- "Greg" is

1        what he went by, though, so I don't know if that's the  
2        same person or not.

3        Q            If that is a "Ragsdale" that lives at  
4        Cason --

5        A            Yes, sir.

6        Q            -- it's possible that you know him?

7        A            I worked with him. Yes, sir. It's possible  
8        I do. I don't know what his proper name -- I don't know  
9        if "Greg" was his proper name or not.

10       Q            Let me ask you kind of a double jointed  
11       question; if that is he or perhaps that is his father,  
12       brother, okay, if it is him would that effect your  
13       deliberations?

14                    And what I'm asking you, is he a person  
15       to whom -- as to what he testified because you already  
16       know them, would it put them at least at that starting  
17       line that Mr. Townsend talked about, would it give him  
18       a little head start?

19       A            No, sir.

20       Q            It would not?

21       A            No, sir.

22       Q            I presume that's not a close relationship?

23       A            No.

24       Q            You all didn't hunt, fish together?

25       A            No, sir.



1 Q Go to church together or socialize together?

2 A Just worked together for, I don't know, he  
3 worked there for maybe two years and then he left and  
4 went on, you know, and since then I have had -- not had  
5 any contact with him since then.

6 Q There's a lot of law enforcement officers on  
7 that list, let me ask you a question about them; would  
8 you because a man is an agent of the state of Texas and  
9 that is a law enforcement officer, would that fact alone  
10 give him a head start in you believing his testimony?

11 A No, sir.

12 Q You wouldn't presume that he was telling the  
13 truth anymore than any other witness merely because he  
14 sat down on that witness stand wearing a badge?

15 A No.

16 Q Special Issue #1, you have looked at?

17 A Yes.

18 Q I believe Mr. Townsend talked to you about  
19 "probability", being -- the word "probability" meaning  
20 "more likely -- more likely than not?"

21 A Yes.

22 Q And that means just a little more than half?

23 A Right.

24 Q I mean if we were weighing it on scales it  
25 would be -- have a balancing scale, it would be to where

1           they just tilted one way? (Indicating)

2           A           Yes, sir.

3           Q           As compared to "beyond a reasonable doubt", is  
4           "beyond a reasonable doubt" a higher standard to you than  
5           "probability?"

6           A           Yes, sir.

7           Q           Okay. What a lawyer usually likes to talk  
8           about it is the scales of justice in weighing the  
9           evidence and "more likely than not" meaning just a  
10          tilting? (Indicating)

11          A           Right.

12          Q           A "reasonable doubt" is a "clear shift?"  
13          (Indicating)

14          A           Yes, sir.

15          Q           Now, in that issue it tells you that you must  
16          find to answer it "Yes, beyond a reasonable doubt, that  
17          it is more likely than not that the defendant would  
18          commit a criminal act of violence that would constitute  
19          a continuing threat to society."

20                      Now, that kind of requires you to -- is  
21          that 50 percent of the evidence or 50 percent plus a  
22          little has to be proven to you beyond a reasonable doubt?

23                      Do you follow me on that?

24          A           Yes, sir.

25                      All right. I see what you are saying.

1 Q The standard we talked about on "reasonable  
2 doubt" that must be proven, that 50 percent must be proof  
3 of such a convincing character that you would be willing  
4 to rely and act upon it without hesitation in the most  
5 important of your own affairs?

6 A Yes, sir. I understand.

7 Q You know that's not saying if 10 things are  
8 testified to that six of them go one way that that is,  
9 you know, "more likely than not", you have to weigh those  
10 things?

11 A Right.

12 Q And the five plus a little that you weigh that  
13 on has to measure up to that without hesitation in the  
14 most important of your own affairs.

15 Do you have any problem with weighing  
16 evidence or considering evidence that way?

17 A No, sir.

18 Q "Criminal acts of violence", do you agree that  
19 there are "criminal acts" that don't amount to  
20 "violence?"

21 A Yes, sir.

22 Q Would you agree with me that forgery is not a  
23 violent crime?

24 A Yes, sir.

25 Q And theft may not be a violent crime?

1 A Yes, sir.

2 Q Now, I don't recall whether or not Mr. Townsend  
3 talked to you about "society", but "society" does not  
4 exclude the penitentiary.

5 A Yes.

6 Q Have you ever -- you have lived near some  
7 penitentiaries, I know that you lived in Palestine?

8 A Yes, sir.

9 Q Tennessee Colony and several of them around  
10 there?

11 A I have been in the penitentiary with some  
12 church groups before.

13 Q You have been in the penitentiary with some  
14 church groups?

15 A Yes, sir.

16 Q When you were in Palestine what were you doing  
17 for a living?

18 A Worked for Houston Lighting & Power at a power  
19 plant.

20 Q Did you work in the -- in your job at your  
21 power plant did you work in those penal institutions?

22 A No, sir. No. Only time I have ever been there  
23 or around one was with a group that is called -- oh, I  
24 can't remember now, Paul Carlan was the man that --  
25 "The Bible Prison Institute" is what it is.

1 Q Were you active in that?

2 A I went on three different occasions to three  
3 different units with -- on the prison there, prison  
4 revivals is what they are, you went in and talked and  
5 visited with the prisoners all day on Saturday and that  
6 night had a -- actually you went in on Saturday and then  
7 had a service that night, went back in Saturday, had a  
8 service and just invited them to church services, talked  
9 to them, visited with them, shared Christ with them if  
10 you was able.

11 And that's the only contact that I have  
12 had with the prison system.

13 Q Let me ask you something about that experience  
14 and I don't know exactly how to ask it, was that an  
15 experience that you enjoyed?

16 A I enjoyed sharing my faith with men that I felt  
17 like needed it. Yes, sir.

18 Q Did you feel like we all have an obligation to  
19 God?

20 A Yes, sir.

21 Q Do you feel like in doing that you fulfilled  
22 your obligation, not totally fulfilled but toward  
23 fulfilling your obligation?

24 A Yes, sir. I felt like I was doing what I am  
25 supposed to as a Christian. Yes, sir.

1 Q You have been in penitentiaries as a visitor?

2 A Yes, sir.

3 Q And in this case you may be asked to send a man  
4 to the penitentiary if you find him guilty?

5 A Yes, sir.

6 Q One of the options -- to some degree you have  
7 seen the inner workings of the penitentiary?

8 A To some degree.

9 Q In fact you have seen penitentiary society?

10 A Yeah. I think when I -- the limited amount of  
11 time I am there I'm not sure I could say that I fully  
12 understand.

13 Q But you have observed it to some degree?

14 A Yes.

15 Q That's knowledge you carry around in your head  
16 that I can't take away from you?

17 A Yes.

18 Q Anything that might could or would effect your  
19 verdict in this case?

20 A I don't think so, you know. I don't. No.

21 I believe that those men were there,  
22 were there for a reason, I believe that some jury  
23 convicted them based on the evidence just like I will  
24 have to do if I am selected for this jury and they were  
25 there accordingly.

1 Q What I'm really asking, you know some of the  
2 inner workings of the penitentiary from your observation?

3 A Yes, sir.

4 Q As opposed to someone that has just driven by  
5 the outside of one?

6 A Yes, sir.

7 Q Knowing that, could it influence your answer  
8 to Special Issue #1 or any other issue in this case?

9 A No.

10 Q In answering Special Issue #1 you will be  
11 informed as Mr. Townsend told you the result of your  
12 answer, if you answer that question "No" the defendant  
13 receives a life sentence in the penitentiary, right?

14 A Yes, sir.

15 Q Okay. Mr. Townsend also told you that you are  
16 -- that you aren't to consider the law of parole, the 35  
17 years that you know that he's going to do. In answering  
18 that question life equals life, that means that you must  
19 presume that he would be there for the rest of his life,  
20 okay?

21 A Yes, sir.

22 Q Are you comfortable doing that?

23 A Yes, sir.

24 Q We ask a lot of you, we tell you something and  
25 we say, "That's what it is but don't consider it?"

1 A Right.

2 Q Anything in your relationship and your ministry  
3 at the penitentiary that could cause you to make an  
4 improper answer to that question?

5 A No. No, sir.

6 Q Let me ask you about the word "sufficient" as  
7 it appears in the next issue; what does "sufficient" mean  
8 to you?

9 A It means it's good enough to just -- good  
10 enough to get you by, if you do a sufficient job you are  
11 just doing enough to get by.

12 Q It's "enough, just enough?"

13 A Yes, sir.

14 Q And it may not even be 50 percent, is that  
15 right, just "enough?"

16 A Yes, sir.

17 Q Okay. It tells you under that question,  
18 "Mitigating evidence is evidence that a juror might  
19 regard as reducing the defendant's moral  
20 blameworthiness", I mean I am slow on these questions,  
21 it's hard to ask and hard to get framed in the correct  
22 manner, I'm going to ask you to bear with me.

23 I'm not asking you what you would do  
24 with the evidence once you received it and heard it.

25 A Yes.



1 Q Did you ever hear a friend of yours or someone  
2 say "My wife talks all the time, I just don't listen to  
3 her, it goes in one ear and out the other?"

4 A I have heard that.

5 Q There are people -- I have had this answer,  
6 "Mr. Old, I don't care how many psychiatrists you bring  
7 in here, I don't care what college they went to, I don't  
8 care how long they have done it. Yeah. I will sit over  
9 there and I will hear the words but they will pass  
10 through this ear and out the other one. I just can't  
11 consider that."

12 Now, that's what I'm asking you about  
13 the type of evidence that I'm going to ask you about, if  
14 one of them falls in a category that is going to go in  
15 one ear and out the other, the evidence that you would  
16 just totally reject and say, "You could make me listen  
17 to it all day but I'm not going to consider" --

18 A Yes.

19 Q -- "as evidence."

20 Would you consider the age of a person?

21 I'm not asking what you would do, I'm  
22 just asking, would you listen to testimony and weigh it  
23 to the extent that it would be evidence that you just  
24 wouldn't reject and push off to the side and say "No.  
25 Not under any circumstances am I going to listen to

1 evidence on that."

2 A Yes, sir. I would listen to it.

3 Q Someone's background, I'm talking about how  
4 they were raised, I mean I can give you any sort of  
5 scenario, they came from a rich family or went to private  
6 school or they came from a poor family and nobody made  
7 them go to school; is that evidence that you would weigh  
8 and not reject?

9 A Yes.

10 Q You would consider psychiatric testimony?

11 A Yes, sir.

12 Q Would you consider someone's religious belief  
13 or confessing to be a Christian?

14 A Yes, sir.

15 Q Let me give you another question, I mean I'm  
16 not talking about this trial, I'm just talking about in  
17 general; a defendant has a choice of pleading guilty or  
18 not guilty, that is a choice that if the person is  
19 intelligent he lets his lawyer make.

20 Now, what Mr. Townsend has told you and  
21 what I have told you and what the Judge told you; before  
22 a man is guilty he's presumed to be innocent?

23 A Yes, sir.

24 Q Before -- until there is proof beyond a  
25 reasonable doubt and the State doesn't prove something

1 to you beyond a reasonable doubt then your duty as a  
2 citizen and as a juror is to find him not guilty.

3 Do you have a problem with that?

4 A No, sir.

5 Q In answering Special Issue #1 or Issue #2 if  
6 a man pled not guilty and you found him guilty would the  
7 fact that he pled not guilty effect your answers?

8 A No, sir.

9 Q I mean you are not going to say, "Well, I'm  
10 taking into consideration the fact that the men pled not  
11 guilty and the evidence showed that he was guilty?"

12 A No, sir.

13 Q I mean you wouldn't get into that and that  
14 would not be evidence that you would weigh, that's not  
15 evidence?

16 A That's part of the indictment, isn't it?

17 Q The same thing about the defendant testifying,  
18 we have a Constitutional right both State and Federal  
19 Constitution and the law of this land has always been the  
20 law of this land, a person is not required to testify  
21 against himself during his trial.

22 A Yes.

23 Q The Court will instruct you in his charge that  
24 you shall not consider the failure of the defendant to  
25 testify as an inference of guilt.

1                   If you told me, "Yes. I would like the  
2 defendant to testify" I wouldn't be shocked.

3                   Would you like for a defendant to  
4 testify?

5                   I mean do you think --

6       A           I don't think it would make any difference.

7       Q           -- do you think it would make your job as a  
8 juror easier if he presented evidence?

9       A           Yes, sir. Probably.

10      Q           Okay. After you heard the evidence and in our  
11 subjective minds as a juror do you agree that you may be  
12 saying I sure wish he would have testified, is that fair?

13      A           Yes. That's probably fair.

14      Q           I mean we can tell you not to consider it but  
15 we can't make you not think it?

16      A           Yes, sir.

17      Q           And I mean, presume that the defendant, the  
18 Judge said back in October when you were first here we  
19 could sit and work crossword puzzles, does not have to  
20 open his mouth?

21      A           No.

22      Q           Said you were -- in that sort of situation,  
23 let's say evidence is pretty close; is the fact that he  
24 did not do anything going to influence your verdict?

25      A           No, sir.

1 THE COURT: Thirty-six  
2 minutes.

3 MR. OLD: You could lay that  
4 aside and push it aside, could you make the decision on  
5 the evidence that you hear?

6 THE POTENTIAL JUROR: Yes,  
7 sir. I could.

8 Q (BY MR. OLD) Same thing on Mr. Townsend's  
9 confession example, a jury determines and the Court will  
10 tell you how to judge a confession as to whether or not  
11 it is voluntary or not, will tell you that you must first  
12 find that the confession offered was voluntary and will  
13 tell you a confession is voluntary and made of the  
14 defendant's own free will if, and give you a list of  
15 things that have to happen or can't happen.

16 Okay. You have heard the confession  
17 read, you believe beyond a reasonable doubt that the  
18 confession is true.

19 A Yes.

20 Q But you find, and there's no question beyond  
21 a reasonable doubt you believe it is involuntary?

22 A Right.

23 Q Okay. Then the Court says if you are in that  
24 position, I don't care how much you believe it's true,  
25 if you find it is involuntary or have a reasonable doubt

1       thereof as to the issue of voluntariness of the  
2       confession push it aside over here, don't consider it for  
3       any purpose. (Indicating)

4       A           Right.

5       Q           Is that a hard thing? Do you think that's  
6       going to be a hard thing to do?

7       A           Yeah. I think once you have heard it's going  
8       to be something that's going to be in your mind, you have  
9       to --

10      Q           Especially when you believe it to be true?

11      A           Yes, sir.

12      Q           Now, there's something that I call "boot  
13      strapping", that is using one thing to pull another up,  
14      you know, let's say there is some other evidence, are you  
15      going to use that involuntary confession to boot strap  
16      the other evidence, to pull it on up to "beyond a  
17      reasonable doubt?"

18      A           No.

19      Q           I mean, I know you aren't going to  
20      intentionally do that, do you think subjectively you  
21      would?

22                   I'm talking about mental process.

23      A           No, sir. I think I can be fair about it, you  
24      know.

25      Q           I mean I'm not -- let's talk about fairness,

1 fairness is this; if that confession is involuntary --

2 A Then you discard it.

3 Q You discard it. Even if supported by other  
4 evidence it's still discarded?

5 A Yes.

6 Q You can't say "Well, witness so and so  
7 testified that, you know, about the same as the  
8 confession, I believe the confession. Now, witness so  
9 and so has been the most -- I just have -- a problem I  
10 had with them is they had all these bad things, they had  
11 a motive to testify but because -- I believe it's  
12 involuntary, the defendant made a true statement, that  
13 proves to me that witness so and so's testimony is true  
14 beyond a reasonable doubt."

15 Can you not do that in that situation?

16 A Yes, sir.

17 Q I mean if it matches perfectly and the witness  
18 that testified is not credible enough for you to get you  
19 beyond a reasonable doubt on their own you can't go grab  
20 that confession that you laid aside and say, "They match,  
21 let's add it over here to the stack and get it up over  
22 here?" (Indicating)

23 A Yes, sir. I can.

24 Q This bit about parole, the Court will tell you  
25 not to consider the fact that someone may ultimately be

1        paroled, they will tell you that it's not something that  
2        you are to consider and they will tell you in any event  
3        the defendant must spent 35 real years before he even  
4        becomes eligible. "Eligible" does not mean that he will  
5        ever get parole, it merely means application can be made.

6                    But we are telling you life equals life  
7        and that's the way you are supposed to see it, is that  
8        going to effect you in any way?

9        A            No, sir.

10       Q            See, in answer to Special Issue #1, you know  
11       that if you answer it "No" you have in effect given a  
12       life sentence?

13       A            Yes, sir.

14       Q            And you are assuming that he's going to be in  
15       the penitentiary for the rest of his life?

16       A            Yes, sir.

17       Q            Even though you know that after 35 years --

18       A            He will be eligible for parole. Yes, sir.

19       Q            That's not going to sway you to the other  
20       answer to say "Yes?"

21       A            No, sir.

22       Q            Okay. I mean you are really -- that question  
23       really asks you "If we put this man in the penitentiary  
24       for the rest of his life is he a continuing threat to  
25       society?"



1 A Right.

2 Q You summarized what you had heard or read in  
3 the newspaper as "A man was killed, his truck was stolen  
4 and his truck was recovered out of state?"

5 A Yes, sir.

6 Q Is that a shorthand rendition of what you heard  
7 or is that just all that you have heard?

8 A That's pretty shorthand.

9 I heard that he had him and his  
10 girlfriend, I -- I guess I need to add there was another  
11 accomplice or another person involved, too.

12 Q Did you hear anything about how the man was  
13 killed?

14 A No, sir. Shot.

15 Q "Shot?"

16 Well, where he was shot?

17 A No, sir.

18 Q How many times?

19 A No, sir.

20 Q If the State's evidence was lacking to you  
21 would you reach out to what you had heard and say, "Well,  
22 I heard it and that is some evidence to me that the  
23 State's evidence is right?"

24 A No, sir.

25 Q Okay. I mean you understand that what you base

1 your decision on must come to you in this courtroom?

2 A Yes, sir.

3 Q From --

4 A The evidence presented.

5 Q -- the evidence in this case?

6 Which means basically is the testimony  
7 of witnesses or tangible evidence offered?

8 A Yes, sir.

9 Q Now, you said you had heard, have you passed  
10 on what you have heard to other people?

11 A I just, you know, in the discussion if I had  
12 heard something -- this has all took place basically when  
13 the crime was committed or there shortly after when it  
14 was in the news in this area. No. As far as recently.  
15 No, sir.

16 Q I mean I'm talking about back when you talking,  
17 talking about this, did you, you know, to somebody who  
18 had not heard did you say, "Hey, did you hear?"

19 A Yeah. I probably could have.

20 You know, it's been awhile ago so I  
21 don't know. I couldn't definitely say I have or I  
22 haven't.

23 Q I'm not asking you --

24 A It's a possibility. Yes.

25 Q -- I'm not asking you how strong of an opinion

1       you -- I -- I'm not asking you beyond a reasonable doubt  
2       you formed any particular opinion, did you form an  
3       opinion about what happened out there?

4       A           Yeah.

5       Q           Okay.

6       A           Yes. I mean just based on what you hear I  
7       guess you form an opinion. I would have to say "Yes" to  
8       that.

9       Q           And did you form an opinion that the person who  
10      was ultimately arrested was guilty?

11      A           From what I heard I would say "Yes" but, you  
12      know, I can't say that anything that I heard was  
13      conclusive enough to find someone guilty, you know.

14      Q           I mean -- but you did form an opinion, you  
15      formed an opinion as to guilt?

16      A           Yes, sir.

17      Q           And that was the person who was ultimately  
18      arrested?

19      A           I don't know. I never -- until -- until I  
20      heard the man's name back in October I didn't know who  
21      it was.

22      Q           No. I know you didn't know his name but you  
23      heard they had arrested somebody?

24      A           Yes, sir.

25      Q           And presuming that's the same person being

1       tried that was arrested you formed an opinion of guilt?

2       A           Yes.

3       Q           As we sit here today or as evidence is started  
4       in this case will it require evidence to remove that  
5       opinion from your mind?

6       A           No, sir. No.

7                   I believe I can clean the slate and  
8       start over.

9       Q           But you -- let me search your soul a little;  
10      you said "I believe", that's how we talk, search your  
11      soul and tell me whether you can or cannot.

12      A           Yes, sir. I can.

13                   THE COURT: Four minutes.

14                   MR. OLD: Other than by  
15      presuming something you don't know that the person that  
16      was -- that you heard was arrested with his girlfriend  
17      or he and his girlfriend done it, you don't know that  
18      this is the man seated here, do you? (Indicating)

19                   THE POTENTIAL JUROR: No, sir.

20      Q           (BY MR. OLD) So I mean we can get back to --  
21      I mean even though you formed an opinion about  
22      something --

23      A           Yes.

24      Q           When you sit down in that jury box we are back  
25      to even and we are back to the State having to prove to

1       you in this courtroom guilt beyond a reasonable doubt?

2       A           Yes, sir.

3       Q           We have talked about a lot. I appreciate you  
4       talking to me and let me ask you one more question, I am  
5       inviting you to ask me a question is what I'm doing.

6       A           Yes.

7       Q           Anything that is bothering you about whether  
8       or not you are truly qualified as a juror or any opinion  
9       you may have changed since we started?

10                   I mean someone told me the other day on  
11       talking about the questionnaire and they said, "Yeah,  
12       you know, I went home and I was kind of changed my  
13       opinion on that" and that's -- I mean I understand why.

14       A           Yes.

15       Q           You know, it's real easy to sit around and talk  
16       about how we feel about this particular issue or that  
17       particular issue or "Yeah. I'm in favor of the death  
18       penalty" when we are in the coffee shop, we are in  
19       conversation but when we get down to getting on the jury  
20       and doing it that's -- sometimes we have to really decide  
21       our position on the issue.

22                   And I am by no means -- what you are  
23       saying, you could give the death penalty in an  
24       appropriate case?

25       A           Yes, sir.

1 Q You are not -- if I read you correctly you are  
2 not pro death penalty to the point, "I'm going to give  
3 the death penalty until something else is proven to me?"

4 A Right.

5 Q You can let those two issues and the law really  
6 decide the punishment?

7 A Yes, sir.

8 Q Anything you want to ask back to me or to the  
9 Court, anything you think we need to know to consider  
10 you?

11 A No, sir.

12 I believe I would just do, just say that  
13 I would be fair and listen to the evidence and form an  
14 opinion based on that evidence if I was chosen is all I  
15 can say.

16 Q Your use of the word "fair" there?

17 A Yes, sir.

18 Q Is that saying that --

19 A It's saying -- I use the word "fair" to say  
20 that I would be open-minded to what was being presented  
21 to me.

22 Q Can you be fair with the law and take the law  
23 as you get it from the Court?

24 A Yes, sir.

25 Q I mean there's a lot of things you probably

1 think are horrible that may not actually be against the  
2 law but I mean you wouldn't find a man guilty of doing  
3 something because you personally didn't like it, it would  
4 have to be against the law?

5 A Yes, sir.

6 MR. OLD: Your Honor, we would  
7 pass the juror.

8 THE COURT: Sir, if you will  
9 return to the jury room or to the waiting area I will  
10 send further instruction to you in a moment.

11 THE BAILIFF: Watch your step  
12 up there.

13  
14 (The following occurred outside the  
15 presence and hearing of the potential juror:)

16  
17 THE COURT: Does the State  
18 have any challenges?

19 MR. TOWNSEND: None, Your  
20 Honor.

21 THE COURT: The Defense have  
22 any challenges?

23 MR. OLD: Lance is doing them  
24 on this, I can't think of any, Your Honor.

25 THE COURT: Mr. Hinson?

1 MR. HINSON: None that I can  
2 credibly propose.

3 THE COURT: Let's take a  
4 break.

5 Tell him he's still a prospective juror,  
6 don't discuss this case with anyone and he will be  
7 notified at the end of the week or first of next week  
8 whether or not he will be on the jury.

9 Okay. We are off the record.

10  
11 (Off the record discussion.)

12  
13 (Recess.)

14  
15 (The following occurred in the presence  
16 and hearing of the potential juror:)

17  
18 BOBBY DWAYNE MOORE, Potential Juror #176,  
19 was called as a Potential Juror and, having been  
20 previously sworn by the Court, testified as follows:

21  
22 THE COURT: Go ahead and take  
23 a seat, sir.

24 Are you "Bobby Moore?"

25 THE POTENTIAL JUROR: Yes.



1 I am.

2 THE COURT: This is juror 42.

3 First, Mr. Moore, I appreciate your  
4 rearranging your schedule and coming on short notice and,  
5 second, I'm sorry we got you down here on short notice  
6 and made you wait.

7 THE POTENTIAL JUROR: Okay.

8 THE COURT: We never know how  
9 long we are going to talk to a juror, that's why we had  
10 to bring some in, our scheduling this morning kind of  
11 fell apart and we needed to get some people in and we  
12 appreciate it.

13 I am Gary Stephens and I'm presiding  
14 over the trial and jury selection, there are two District  
15 Attorneys assigned, not "assigned" but are working on  
16 this case for the State of Texas, the District Attorney  
17 that is handling this case out of Morris County is Mr.  
18 Richard Townsend.

19 His partner for this case is Randy Lee  
20 from Cass County, he's in trial on another case today and  
21 is not with us.

22 Both of the Defense Attorneys are  
23 present today, Mr. Bird Old, III.

24 MR. OLD: Howdy.

25 THE POTENTIAL JUROR: Hi.

1 THE COURT: And Mr. Lance  
2 Hinson.

3 MR. HINSON: Good afternoon.

4 THE COURT: Next to Mr. Hinson  
5 is the person charged, Mr. Billy Joe Wardlow.

6 Now, Mr. Moore, the lawyers have read  
7 your questionnaire, they are familiar with your answers,  
8 they are going to talk to you about those answers and  
9 also talk to you about the principles of law and issues  
10 involved in death penalty cases.

11 You will be asked a lot of questions and  
12 the answers will let us know whether or not to put you  
13 on the jury.

14 In order to be a juror you must be able  
15 to understand and follow the law. You don't even  
16 necessarily have to agree with the law. If you disagree  
17 with some aspect of our law that you can put aside that  
18 disagreement then you are qualified but if you disagree  
19 to such an extent that you can't follow the law you are  
20 not qualified.

21 The only way we know if you can follow  
22 the law is to ask you but we need to know "Yes, I can"  
23 or "No, I can't follow the law."

24 We have found that most jurors can  
25 follow the law but that doesn't necessarily mean they are

1 appropriate jurors in a death penalty case so we want to  
2 know what you think about some of these laws and issues  
3 that we will discuss.

4 Often in trying to make a point a lawyer  
5 will use a set of facts to try to illustrate their point.  
6 If this happens, sir, I want you to understand that they  
7 are not using facts associate with this case, the facts  
8 of this case will be left up to the jury to determine  
9 from the trial so when we are talking about -- if we make  
10 up examples don't assume they have anything to do with  
11 this case because they don't.

12 This is kind of like an interview for  
13 a job that nobody wants but we do expect you to be  
14 truthful with us, there aren't right or wrong answers,  
15 there are not right or wrong opinions, just yours.

16 And if you will be as honest and open  
17 with us as you can we will decide whether or not to put  
18 you on the jury.

19 If you don't understand a question that  
20 a lawyer is asking you make them clarify it, if there's  
21 something that you think we need to know about you that  
22 might make us decide to put you on the jury or not  
23 volunteer that information, both sides want the same  
24 thing, they want 12 fair impartial people who can do  
25 whatever the right thing is and that will depend on the

1 facts.

2 Now, Mr. Moore, you said in your  
3 questionnaire that you do know something about the facts  
4 of this case.

5 Tell me, sir, where have you heard about  
6 this case?

7 THE POTENTIAL JUROR: On  
8 Channel 7 News and the newspaper.

9 THE COURT: What have you  
10 heard?

11 THE POTENTIAL JUROR: Just on  
12 Channel 7 News, you know, that the -- he and someone else  
13 was or that he and someone else was in this man's house  
14 and, you know, they supposedly killed him and stuck him  
15 in a closet and got his pickup and took off.

16 THE COURT: Did you hear Mr.  
17 Wardlow's name mentioned?

18 THE POTENTIAL JUROR: Not that  
19 I remember.

20 THE COURT: Have you ever --  
21 can you associate reading his name in the paper?

22 THE POTENTIAL JUROR:  
23 Originally I don't -- I don't remember his name.

24 THE COURT: So you heard that  
25 a person was killed and that two people allegedly were

1 involved in the killing and took a pickup truck but you  
2 don't know who those two people are?

3 THE POTENTIAL JUROR: No.

4 THE COURT: Did you know the  
5 man that was allegedly murdered?

6 THE POTENTIAL JUROR: No, sir.

7 THE COURT: Have you formed  
8 an opinion about the guilt of Mr. Wardlow?

9 THE POTENTIAL JUROR: Well,  
10 originally when the last facts I heard or not "facts" but  
11 the last that I heard, you know, I assumed that he was  
12 guilty. Yeah.

13 THE COURT: Can you set aside  
14 that assumption and can you presume Mr. Wardlow to be not  
15 guilty at this time?

16 THE POTENTIAL JUROR: Honestly  
17 I would hope to think that I would, you know, could.

18 THE COURT: Have you formed  
19 a conclusion about the guilt of Mr. Wardlow or innocence  
20 of him that would influence your verdict?

21 THE POTENTIAL JUROR: Well,  
22 again, you know, honestly, you know, because of, you  
23 know, each time that I heard something about it, you  
24 know, I just assumed, you know, that he -- that from the  
25 -- what I have heard that he was guilty.

1 THE COURT: Well, you are  
2 telling me that you think you can do this and that you  
3 made these assumptions and there's absolutely nothing  
4 wrong with any of us making those assumptions, there's  
5 certainly wrong with bringing those assumptions and  
6 conclusions into the courtroom if a person has made their  
7 mind up about Mr. Wardlow's guilt or innocence, if they  
8 have decided based on what they have heard that he's  
9 guilty obviously you don't belong on the jury. You  
10 wouldn't want to be on a jury that went in thinking that.

11 You are the only one that can look  
12 inside your mind and heart and tell us, can you presume  
13 Mr. Wardlow be not guilty and make the State prove beyond  
14 a reasonable doubt that he's guilty?

15 THE POTENTIAL JUROR: I think.  
16 Yeah. That I could, you know.

17 THE COURT: You keep using  
18 that word.

19 THE POTENTIAL JUROR: "Think?"

20 THE COURT: I can't accept  
21 that.

22 THE POTENTIAL JUROR: Okay.  
23 You know, probably to be honest that I -- that it would  
24 -- that it would effect my thinking, what I already  
25 believe, you know, to be true.

1 THE COURT: Are you telling  
2 me that you have formed a conclusion that would influence  
3 your verdict in this case?

4 THE POTENTIAL JUROR: Yes,  
5 sir.

6 THE COURT: Okay.

7 The Court believes based on some  
8 previous rulings that the juror should be discharged at  
9 this time.

10 Does either side disagree with the  
11 Court?

12 MR. TOWNSEND: No, Your Honor.

13 MR. OLD: No.

14 THE COURT: I'm going to  
15 release you, sorry we kept you down here for a couple of  
16 hours sitting back there but as you can see it didn't  
17 take too long.

18 THE POTENTIAL JUROR: Okay.

19 THE COURT: I really  
20 appreciate your honesty. A lot of people would come out  
21 here and tell us, you know, "I haven't made my mind up"  
22 because they would think if they were a good citizen that  
23 that's what they would have to say and you have proven  
24 you are a good citizen by coming down here and doing what  
25 we wanted and being honest with us.

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THE POTENTIAL JUROR: Honestly  
I don't believe I could come and --

THE COURT: That's all we  
wanted from you.

Thank you for coming down and telling  
us that and you are free to go.

(Off the record discussion.)

(Record closed for November 16th, 1994.)

(Whereupon Court was recessed until 9:00  
a.m., November 17th, 1994.)

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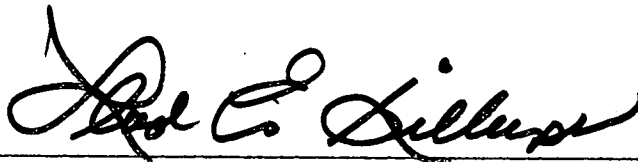


1 STATE OF TEXAS §  
2 COUNTY OF TITUS §

3  
4 I, Lloyd E. Billups, CSR #149 and  
5 Official Court Reporter in and for the 76th Judicial  
6 District, State of Texas, do hereby certify that the  
7 above and foregoing contains a true and correct  
8 transcription of the proceedings in the above-styled and  
9 numbered cause, all of which occurred in open court or  
10 in chambers on November 16, 1994 and were reported by me.

11 I further certify that this  
12 transcription of the record of the proceedings truly and  
13 correctly reflects the exhibits, if any, offered by the  
14 respective parties.

15 WITNESS MY HAND this 31<sup>ST</sup> day of  
16 January, 1995.

17 

18 LLOYD E. BILLUPS, CSR #149 & OFFICIAL COURT REPORTER  
19 76TH JUDICIAL DISTRICT, STATE OF TEXAS  
20  
21  
22  
23  
24  
25

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